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AMERICAN ELECTRICAL CASES

BEING

A COLLECTION OF ALL THE IMPORTANT CASES (EXCEPT-
ING PATENT CASES) DECIDED IN THE STATE AND
FEDERAL COURTS OF THE UNITED STATES
FROM 1873 ON SUBJECTS RELATING TO

THE TELEGRAPH, THE TELEPHONE, ELECTRIC
LIGHT AND POWER, AND OTHER PRAC-
TICAL USES OF ELECTRICITY

WITH ANNOTATIONS

EDITED BY

WILLIAM W. MORRILL,

Author of "Competency and Privilege of Witnesses," "City Negligence," etc.

VOLUME II.

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PREFACE.

THE cases contained in this volume were nearly all decided in the period beginning Jan. 1, 1886, and ending July 1, 1889. They are arranged, however, not chronologically, as in vol. 1, but as far as possible by grouping together those upon the same or similar subjects. The cases based upon error, delay or default of telegraph companies in the transmission of messages, which occupy the last part of the volume, are grouped by States. It is believed this plan will be more convenient and satisfactory than the other.

Another change is the insertion at the end of the head-note to each case of a list of the cases of this series therein cited, with reference to the volume and page where each may be found.

The editor desires to express his appreciation of the interest which members of the bar and editors of law journals have manifested in this series, as shown particularly by criticisms and suggestions, some of which have been adopted for this volume and others may be for future volumes. He feels particularly pleased that the plan of the index seems to be generally acceptable, however faulty its execution may be and doubtless is.

He also desires to express his thanks to a considerable number of lawyers for personal letters of information and suggestion; especially to Roger Foster, Esq., of New York city, and B. K. Miller, Jr., Esq., of Milwaukee, for copies of unpublished decisions, which he might otherwise have been unable to obtain.

And he would be very grateful for future assistance of the same kind, from whatever source, especially for information as to unpublished cases and cases contained in legal periodicals and series of reports having local or limited circulation.

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AMERICAN ELECTRICAL CASES.

JOHN E. HOCKETT v. THE STATE OF INDIANA.

Indiana Supreme Court, Feb. 20, 1886.

(105 Ind. 250.)

TELEPHONE COMPANIES.—POWER OF STATE TO CONTROL RATES.

The State may regulate the rental price of telephones, to the extent of fixing a maximum price. This is by virtue of the police power of the State, and is not affected by the fact that the articles used and furnished to patrons by the telephone company are patented.

A telephone company is not a mere private business corporation; it is a common carrier of news. Its instruments and appliances are in legal contemplation devoted to a public use, and thus subject to legislative regulation and control.

The word "telephone," as used in the Indiana statute, was intended to designate all the usual and necessary instruments for the convenient and ready transmission and reception of telephonic messages, and not a single instrument only, which may happen to be technically known as a "telephone."

The fact that a customer, for whom a special line of telephone has been placed, cannot be served at the legal rates, without loss to the company, cannot avail the company in court as an excuse for charging a higher price; because (1) no statute requires the maintenance of particular lines of telephone at a loss, and, therefore, the company may discontinue the line; and (2) if it were otherwise, the remedy must be sought in the legislature.

Cases of this series cited in opinion: *State of Ohio, ex rel. &c. v. Bell Telephone Co. et al.*, vol. 1, p. 299; *W. U. Tel. Co. v. Pendleton*, vol. 1, p. 632; *State of Nebraska, ex rel. &c. v. Nebraska Teleph. Co.*, vol. 1, p. 700; *American Rapid Teleph. Co. v. Bell Teleph. Co.*, vol. 1, p. 890.

CRIMINAL prosecution of agent of telegraph company for charging more than the maximum statutory rate. Appeal by defendant from judgment of conviction and imposing fine. The opinion states the case.

J. E. Macdonald, J. M. Butler, A. L. Mason, T. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, Baker, E. Daniels, N. Williams, J. L. Thompson and S. Holt, for appellant.

F. T. Hord, attorney-general, *A. C. Harris*, *W. H. kins*, *C. Byfield*, and *L. Howland*, for the State.

NIBLACK, C. J.: On the 13th day of April, 1885, the legislature of this State passed an act, entitled, "An act to regulate the rental allowed for use of telephones," fixing a penalty for its violation, the tenor of which follows:

"Section 1. *Be it enacted by the General Assembly of the State of Indiana,* That no individual, company or corporation now or hereafter owning, controlling or operating any telephone line in operation in this State shall be allowed to charge, collect or receive as rental for the use of such telephones, a sum exceeding \$3 per month where one telephone is rented by one individual, company or corporation. Where two or more telephones are rented by the same individual, company or corporation the rental per month for each telephone so rented shall not exceed \$3 per month.

“Sec. 2. Where any two cities or villiages are connected by wire or owned by any individual, company or corporation, the price for of any telephone for the purpose of conversation between such villiages shall not exceed fifteen cents for the first five minutes, each additional five minutes no sum exceeding five cents shall be collected or received.

"Sec. 3. Any owner, operator, agent or other person, who shall collect or receive for the use of any telephone, any sum in excess of the rates fixed by this act, shall be deemed guilty of a public offense. Upon conviction shall be fined in any sum not exceeding \$25."

On the 27th day of July, 1885, Theodore P. Ha requested the Central Union Telephone Company, a ration organized under the laws of the State of Illino

owning and operating a telephone exchange and a system of telephone lines at the city of Indianapolis, in this State, to rent him one telephone, to be used at his residence upon his farm, four and one-half miles from the company's telephone exchange, and two miles outside of the corporate limits of the city of Indianapolis, and to connect such telephone with the exchange by the erection of the necessary poles and wires. In response to this request, the company offered to rent to Haughey a hand telephone and magneto bell, and to connect them with its exchange, and to furnish exchange service from 7 o'clock A. M. until 6 o'clock P. M. each day, for \$3 per month, the company to have the right to place other subscribers on the same line. But Haughey declined to accept that offer, and instead entered into a contract with the company for the use of "one battery transmitter and one magneto telephone," and "necessary appliances for connecting them with the exchange," upon certain terms and conditions named in the contract, for which he agreed to pay the company the sum of \$33.50 for each quarter, or \$11.16 2-3 per month.

The contract says:

"The above total sum is based upon the charges itemized as follows:

"Rental of one magneto telephone and one battery transmitter (two telephones), at the rate of \$20 per annum.

"Labor and services, charges for switching, construction and maintenance, charges for lines, batteries, central office apparatus, magneto bell and other appurtenances, at the rate of \$114 " "

The telephone company built the line and furnished the equipments for the use of Haughey, called for by its contract with him.

At the expiration of the first three months after the contract went into effect, the appellant, John E. Hockett, acting as the district superintendent and general agent of the company at Indianapolis, demanded of and received from Haughey the sum of \$33.50, claimed to be due under the contract for the latter's use of the line and equipments therein provided for, during the preceding three months

An information was thereupon filed against Hockett, charging him with a violation of the provisions of the act of the legislature, hereinabove set out, and upon proof of the matters above stated, with others of a formal, incidental, or a merely collateral character, the court below found him guilty of having charged more for the use of a telephone than the law permitted him, as well as the company he represented, to do, and after overruling a motion for a new trial, adjudged that he pay a fine as a penalty for the commission of a criminal offense.

It was shown at the trial that the articles furnished to Haughey as a telephone equipment, as well as all the other mechanical contrivances used by the company in the transmission of words and sounds over its wires, are patented articles, and that the company holds the right to use these patented articles by assignment, either direct or remote, from the patentee.

It is first and most earnestly contended, that as the articles used by the company as above are patented under the Constitution and laws of the United States, the legislature of a State has no power to limit the price, use, sale or rental value of such articles, and that as a consequence, all acts of a State legislature of the class to which the one before us belongs, are inoperative and ineffectual for any practical purpose. Conceding the force as well as the plausibility of many of the arguments and illustrations used by counsel, the ready, and indeed, inevitable answer is, that the question thus presented ought no longer to be regarded as an open question. There is a reserved, and at the same time well recognized power affecting their domestic concerns remaining in all the States which the government of the United States cannot and has seldom attempted to invade. This power is so varied and comprehensive that an exact definition, as applicable to all its phases, has so far been found to be impracticable, but the instances in which the existence of such a power has been judicially recognized in particular cases are quite numerous as well as various in their application to our complex system of

government. This reserved power is usually, though perhaps not always accurately, denominated the police power of a State, and embraces the entire system of internal State regulation, having in view not only the preservation of public order and the prevention of offenses against the State, but also the promotion of such intercourse between the inhabitants of the State as is calculated to prevent a conflict of rights, and to promote the interests of all. *Cooley Const. Lim.* 572.

It is a power inherent in every sovereignty, and is in its broadest sense nothing more than the power of the State to govern men and things within the limits of its own dominion. *License Cases*, 5 How. 504, 582.

It extends to the protection of the lives, limbs, health, comfort and convenience, as well as the property, of all persons within the State. It authorizes the legislature to prescribe the mode and manner in which every one may so use his own as not to injure others, and to do whatever is necessary to promote the public welfare, not inconsistent with its own organic law. *Thorpe v. R. & B. R. R. Co.*, 27 Vt. 140.

In 1867 letters patent were issued to one De Witt, for a discovery in the manufacture of a quality of oil known as "Aurora oil," and one Patterson became the assignee of the right conferred upon De Witt by his letters patent. Under a system of inspection, provided by the laws of Kentucky, some casks containing this Aurora oil were branded "unsafe for illuminating purposes," and notwithstanding a statute of that State making it a penal offense to sell oil thus branded, Patterson sold the casks of oil in question to one Davis. Patterson was thereupon indicted, tried and convicted in one of the Kentucky courts for the alleged unlawful sale of these condemned casks of oil. This judgment convicting Patterson of criminal offense having been affirmed by the Court of Appeals of that State, the cause was taken to the Supreme Court of the United States to test the validity of the statute under which Patterson was so convicted, as a restraint upon the sale of a commodity

covered by letters patent of the United States. Upon a review of all the questions involved, the validity of the statute was maintained, and the judgment of the Court of Appeals was in all things affirmed. See *Patterson v. Kentucky*, 97 U. S. 501.

The court held in that case, and as we have no doubt correctly, that all that the letters patent secured was the exclusive right in the discovery, and that the right thus secured was an incorporeal right, and hence without "tangible substance;" that the right to sell the oil was not derived from the letters patent, but existed and could have been exercised before the issuing of such letters, unless prohibited by some local statute; that because the patentee acquired a monopoly in his discovery, and was hence secure against interference, it did not follow that the tangible property which came into existence by the application of the discovery, was beyond the control of State legislation; that, on the contrary, the right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the discovery itself, just as the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright itself; that hence the right conferred upon the patentee and his assigns to make, use and vend the corporeal article or commodity brought into existence by the application of the patented discovery must be exercised in subordination to the police or local regulations established by the State. The doctrine of that case was approved and followed in the more recent case of *Webber v. Virginia*, 103 U. S. 344, and has the support, either in direct terms or in principle, of numerous other carefully considered cases. *Patterson v. Commonwealth*, 11 Bush. 311 (21 Am. R. 220); *State v. Telephone Co.*, 36 Ohio St. 296 (38 Am. R. 583, and note); *Jordan v. Dayton*, 4 Ohio, 295; *Fry v. State*, 63 Ind. 552; *People v. Russell*, 49 Mich. 617 (43 Am. R. 478); *Thompson v. Staats*, 15 Wend. 395; *Martinnetti v. Maguire*, Deady, 216; *Vannini v. Paine*, 1 Harrington, 65; *License Tax Cases*, 5 Wall. 462; *United States v. De Witt*, 9 Wall. 41; *Rail-*

road Co. v. Husen, 95 U. S. 465; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Breechbill v. Randall*, 102 Ind. 528 (52 Am. R. 695); *Palmer v. State*, 39 Ohio St. 236 (48 Am. R. 429); *Western U. Tel. Co. v. Pendleton*, 95 Ind. 12 (48 Am. R. 692); *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650.

While, therefore, it is true that letters patent confer upon the patentee a monopoly to the extent of vesting in him, his heirs and assigns, the exclusive right to make, use and vend the tangible property brought into existence by the practical application of the discovery covered by the letters patent, for a limited time, it is not true that such exclusive right authorizes the making, using or vending of such tangible property in a manner which would be unlawful except for such letters patent, and independently of State legislation and State control.

It is next contended that the Central Union Telephone Company was organized, and has so far been conducted as an ordinary business investment, and is in its methods as well as in its relations to its patrons and subscribers a merely private enterprise, no more subject to legislative control than any other private business with which a considerable number of persons have become either directly or indirectly connected; that consequently the act of the legislature, under which this prosecution was instituted, is inoperative and void as a restraint upon the company in its charges for the rental and the use of its instruments.

The telephone is one of the remarkable productions of the present century, and although its discovery is of recent date, it has been in use long enough to have attained well defined relations to the general public. It has become as much a matter of public convenience and public necessity as were the stage coach and sailing vessel a hundred years ago, or as the steamboat, the railroad and the telegraph have become in later years. It has already become an important instrument of commerce. No other known device can supply the extraordinary facilities which it affords. It may, therefore, be regarded, when relatively

considered, as an indispensable instrument of commerce. The relations which it has assumed toward the public make it a common carrier of news, a common carrier in the sense in which the telegraph is a common carrier, and impose upon it certain well defined obligations of a public character. All the instruments and appliances used by a telephone company in the prosecution of its business are consequently, in legal contemplation, devoted to public use. *State ex rel. v. Nebraska Telephone Co.*, 22 N. W. Rep. 237; 22 Cent. Law Jour. 33; *State of Missouri v. Bell Telephone Co.*, 23 Fed. Rep. 539; *State v. Telephone Co.*, *supra*; *American Rapid Tel. Co. v. Connecticut Telephone Co.*, 44 Am. R. 237, n.

It is now a well settled legal proposition that property thus devoted to a public use becomes a legitimate subject of legislative regulation and control. In recognition of that doctrine the case of *Munn v. Illinois*, 94 U. S. 113, has become a leading case.

It was in general terms held in that case, that when the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use to which he has so devoted his property, and that he can only escape such public control by withdrawing his grant and discontinuing the use. In support of that conclusion, the court said it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, and the like, and in so doing to fix a maximum of charges to be made for services rendered, accommodations extended and articles sold. This case has been the subject of much unfriendly comment and has encountered some very sharp criticism, but its authority as a precedent remains unshaken.

This State regulation and control of property devoted to a public use is not the *taking* of property for a public pur-

pose within the meaning of section 21 of article 1 of the Constitution of this State. Nor is such regulation and control an interference with the guaranteed rights of a citizen in private property. As bearing generally upon the subjects last above referred to, see also the cases of *Chicago, etc. R. R. Co. v. Iowa*, 94 U. S. 155; *Chicago, etc. R. R. Co. v. Ackley*, 94 U. S. 179; *Winona, etc. R. R. Co. v. Blake*, 94 U. S. 180; *Railroad Co. v. Richmond*, 96 U. S. 521; *Railroad Co. v. Fuller*, 17 Wall. 560; *Olcott v. Supervisors*, 16 Wall. 678; *Ruggles v. Illinois*, 108 U. S. 526; *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Ruggles v. People*, 91 Ill. 256; *Illinois Central R. R. Co. v. People*, 108 U. S. 541; S. C., 1 A. & E. R. R. Cas. 188; *Allnut v. Inglis*, 12 East. 527; *Mayor, etc. of Mobile v. Yuille*, 3 Ala. 137; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 343; *Bolt v. Stennett*, 8 T. R. 606; *Com. v. Duane*, 98 Mass. 1; *Com. v. Tewksbury*, 11 Metc. 55; *Com. v. Alger*, 7 Cush. 53; *Metropolitan Board v. Barrie*, 34 N. Y. 657; *Slaughter House Cases*, 16 Wall. 36; *Sharpless v. Mayor, etc.*, 21 Pa. St. 147; *Grant v. Courter*, 24 Barb. 232; *Bartmeyer v. Iowa*, 18 Wall. 129; *Beer Co. v. Mass.*, *supra*; *Ogden v. Saunders*, 12 Wheat. 212; *Standard Oil Co. v. Combs*, 96 Ind. 179 (49 Am. R. 156); *Western U. Tel. Co. v. Pendleton*, *supra*; *Indianapolis, etc. R. R. Co. v. Kercheval*, 16 Ind. 84; *Foster v. Kansas*, 112 U. S. 201; *Brechbill v. Randall*, 102 Ind. 528; *Fry v. State*, *supra*; *Toledo Agr'l Works v. Work*, 70 Ind. 253; *West Virginia, etc. Co. v. Volcanic Oil Co.*, 5 W. Va. 382; *State v. Perry*, 5 Jones L. 252; *Attorney-General v. Railroad Companies*, 35 Wis. 425.

The obvious deduction from what has been said, as well as from the authorities cited, is that the power of a State legislature to prescribe the maximum charges which a telephone company may make for services rendered, facilities afforded, or articles of property furnished for use in its business, is plenary and complete.

It was made to appear by the evidence that there are several instruments more or less in use by telephone com-

panies, each known as a "telephone," one as a hand telephone, another as a box telephone, a third as a switchman's head telephone, and the fourth as the battery transmitting telephone; that the first, known also as the Bell hand or magnetic telephone, consists of a bay magnet with a helix of wire at one end, a diaphragm suitably mounted in front of the helix, and a hard rubber case supporting the whole, with combined poles for making connection with a cord from twenty-four to thirty inches long, and through it, with a magneto bell; that this telephone will both transmit and receive sounds or words carried electrically over a connecting wire; that this instrument was at first, with the assistance only of the magneto or call bell, used in transmitting as well as in receiving telephonic messages; that some time after this Bell hand telephone had thus come into use, the battery transmitting telephone, known as the Blake transmitter, was introduced and generally accepted as a very decided improvement in the transmission of words and sounds over wires used by telephone companies, words and sounds being transmitted through it in a louder tone and with greater effect than through the Bell hand telephone; that for some time previous to the 13th day of April, 1885, this Blake transmitter had come into general use in the transmission of messages with that class of patrons and subscribers who desired the best available telephonic service; that since the Blake transmitter had come into general use as stated, the Bell hand telephone had been chiefly used as a receiver of messages, only a comparatively few persons continuing to use it also for transmitting purposes; that on the day last named, and for a considerable time previously, a fully equipped organization for the convenient and ready transmission and reception of messages over telephonic wires, consisted, as it still consists, of a Bell hand telephone and cord, a Blake transmitter, a magneto or call bell, a cell of battery, a backboard and a battery box; that the instruments thus constituting a telephonic equipment have been and still are only rented by telephone companies to their patrons and subscribers,

the latter not being allowed to either purchase or own any of such instruments.

Upon the facts thus disclosed by the evidence, it is in the third place contended that the act of April 13th, 1885, under consideration, only limits the price to be charged to three dollars per month when one instrument, known as a telephone, is rented to a patron or subscriber, and does not apply to a case like the one before us, where two instruments, each answering to that name, are for his greater convenience rented to the same person to be used together, and that consequently the facts in this case do not bring it within the penal provisions of that act.

In a general sense the name "telephone" applies to any instrument or apparatus which transmits sound beyond the limits of ordinary audibility. The speaking tube used in conveying the sound of the voice from one room to another in large buildings, or a stretched cord or wire attached to vibrating membranes or discs, by which the voice is carried to a distant point, is strictly speaking a telephone.

But since the recent discoveries in telephony, the name is technically and primarily restricted to an instrument or device which transmits sound by means of electricity and wires similar to telegraphic wires. In a secondary sense, however, being the sense in which it is most commonly understood, the word "telephone" constitutes a generic term, having reference generally to the art of telephony as an institution, but more particularly to the apparatus, as an entirety ordinarily used in the transmission, as well as in the reception of telephonic messages. In this latter sense the Central Union Telephone Company, in behalf of which the appellant stands as the representative in this proceeding, has very significantly sanctioned the use of the word "telephone."

In August, 1885, it published a book for the use of its patrons and subscribers, entitled, "Indianapolis Telephone Directory," in which those having the use of its telephonic instruments were instructed as follows:

"Call by numbers."

“When through talking ring out.”

“Make all complaints to the chief operator—call No. 1,000.”

“Help each other by answering your telephone promptly.”

“Do not allow non-subscribers to use your telephone. It is unjust to other subscribers, impedes the service and is a violation of your contract.”

These were a substantial repetition of instructions issued by the Western Telephone Company, one of the predecessors of the Central Union Telephone Company, in June, 1883. In these instructions the “telephone” is plainly referred to as an organized apparatus—an institution—and not as a single instrument. In this use of the word “telephone” the telephone companies in question simply adopted and emphasized what had already been generally accepted as the proper meaning of that word in the connection in which it was so used by them.

Before the great discovery of Prof. Morse in telegraphy, the power of electricity to give a sudden and mysterious impulse to a suspended wire was well understood among those most familiar with experiments in electrical science. His discovery consisted in the invention of an instrument, or machine, which utilized that power of electricity, and thereby enabled him to send intelligible messages over suspended wires to remotely distant places. When that instrument or machine first came into use, the word “telegraph” was understood to more particularly refer to it as the thing best known by that name; but since that time a much wider and comprehensive meaning has been attached to that word.

The “telegraph” is now usually accepted, and in common parlance is generally understood, as referring to the entire system of appliances used in the transmission of telegraphic messages by electricity, consisting of: *First*. A battery or other source of electricity power; *secondly*, of a line wire or conductor for conveying the electric current from one station to another; *thirdly*, of the apparatus for

transmitting, interrupting, and if necessary, reversing the electric current at pleasure ; and *fourthly*, of the indicator or signaling instrument. See Imperial Dictionary, title "Telegraph."

In the respect indicated the varying meanings of the word "telephone" are analogous to those applied to the word "telegraph," there being very much in common between the two systems of telephony and telegraphy. In reaching a conclusion as to what is generally understood by the use of the word "telephone," we have been governed partially by the information judicially within our reach, and in other respects by the evidence. The word having become a term of art, evidence was admissible to explain its proper meaning. 1 Greenl. Ev., section 280; Whart. Ev., sections 961 to 972.

In view of the condition of things as shown to have existed on the 13th day of April, 1885, we feel constrained to hold that the word "telephone," as used in the act of that date, was intended to designate, and in fact really referred to an apparatus composed of all the usual and necessary instruments for the convenient and ready transmission and reception of telephonic messages, and not to a single instrument only.

There was evidence at the trial tending to prove that the Central Union Telephone Company cannot supply the facilities to Haughey provided for in its contract with him, for three dollars per month, without actual and very serious loss ; and arguing that the legislature cannot be presumed to have intended to inflict injustice upon any person or corporation, it is insisted we ought to take the company's liability to sustain a great loss in a certain contingency into consideration in determining the legislative intention in enacting the statute in question in this case. This argument is largely based upon the assumption that the company was not at liberty to decline to extend its lines to Haughey's farm upon his request that such an extension should be made, and that it will be compelled to maintain such extension so long as Haughey may require it to be

Telephone Co. v. Bradbury.

maintained, independently of any contract with him on the subject. This assumption is, however, not well founded. There is nothing in the act of the legislature under review or contained in any other statutory or common law regulation applicable to the subject, to which our attention has been called, which requires a telephone company to construct a new line against its will or to maintain an old line longer than it may feel inclined to do so in the exercise of a legitimate business discretion. Besides, the power of the legislature to pass the act in question being conceded, this court cannot sit in judgment upon either the justice or the expediency of the enactment of such a law.

If the law shall prove to be either unjust or inexpedient in its operation, whether upon persons or corporations, the appeal must be to the legislature, and not to the courts. 20 Cent. Law Jour. 83.

The judgment is affirmed with costs.

NOTE.—This case is cited in the following cases, *post* : *Johnson v. State of Indiana* ; *Chesapeake & Potomac Teleph. Co. v. B. & O. Tel Co.* ; *Central Union Teleph. Co. v. Bradbury* ; *Central Union Teleph. Co. v. State ex rel. Falley*.

See note to case last above mentioned.

CENTRAL UNION TELEPHONE COMPANY v. D. M. BRADBURY.

Indiana Supreme Court, March 23, 1886.

(106 Ind. 1.)

TELEPHONE COMPANIES.—POWER OF LEGISLATURE TO CONTROL RATES.—
MANDAMUS.

Telephone companies are common carriers of news, and as such are bound to serve the public impartially. This is a common law duty, and the Statute, Acts 1885, p. 151, imposing in terms substantially that duty, is valid.

Telephone Co. v. Bradbury.

A State legislature has power to regulate the prices of telephone companies, engaged in general telephone business.

The right to telephone service, at the rates fixed by law, may be enforced by mandamus.

Cases of this series cited in opinion: *Hockett v. State*, ante, p. 1; *State of Nebraska v. Nebraska Teleph. Co.*, vol. 1, p. 700; *State of Ohio, ex rel. &c. v. Bell Teleph. Co.*, vol. 1, p. 299; *American Rapid Tel. Co. v. Conn. Teleph. Co.*, vol. 1, p. 390.

APPEAL from judgment of Marion Superior Court, commanding the telephone company, defendant below, to furnish telephone instruments and service at plaintiff's office, at the fixed legal rate of \$3.00 per month.

J. E. McDonald, J. M. Butler, A. L. Mason, T. A. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, A. Baker, E. Daniels, N. Williams, J. L. Thompson and *C. S. Holt*, for appellant.

A. C. Harris, W. H. Calkins, C. Byfield, L. Howland and *D. M. Bradbury*, for appellee.

NIBLACK, C. J.: An act, imposing certain duties upon telegraph and telephone companies, was passed by the general assembly of this State, which was approved and went into effect on the 8th day of April, 1885. The second section of that act is as follows :

"Every telephone company with wires wholly or partly within this State, and engaged in a general telephone business, shall, within the local limits of such telephone company's business, supply all applicants for telephone connections and facilities with such connections and facilities, without discrimination or partiality, provided such applicants comply, or offer to comply, with the reasonable regulations of the company; and no such company shall impose any conditions or restrictions upon any such applicant that are not imposed impartially upon all persons or companies in like situation, nor shall such company discriminate against any individual or company engaged in any lawful business, or between individuals or companies engaged in the same business, by requiring, as a condition for furnishing such facilities, that they shall not be used in the business of the applicant, or otherwise, for any lawful purpose." Acts 1885, 151.

On the 13th day of April, 1885, the general assembly passed another act entitled "An act to regulate the rental allowed for the use of telephones, and fixing a penalty for its violation," the first section of which is in the following words :

"That no individual, company or corporation, now or hereafter owning, controlling or operating any telephone line in operation in this State, shall be allowed to charge, collect or receive, as rental for the use of such telephones, a sum exceeding three dollars per month, where one telephone only is rented by one individual, company or corporation. Where two or more telephones are rented by the same individual, company or corporation, the rental per month for each telephone so rented shall not exceed two dollars and fifty cents per month." Acts 1885, 227.

At the time of the enactment of these statutes the Central Union Telephone Company, a corporation organized under the laws of the State of Illinois, was, as it still is, the owner and operator of a telephonic exchange, and a system of telephone lines within and in the immediate vicinity of the city of Indianapolis, in this State, being then and still the only company engaged in the telephone business within that city.

On the 31st day of August, 1885, Daniel M. Bradbury, a resident citizen of Indianapolis, addressed to this telephone company the following letter:

INDIANAPOLIS, Ind., August 31st, 1885.

"*The Central Union Telephone Company*: I have a law office in room No. 12, in Talbott & New's block, at 29½, on North Pennsylvania street, in this city. I desire to be placed in telephonic communication, by means of your telephone, with the patrons in this city and courts. I therefore demand the use of a telephone in my said office, and I agree to pay as rental for the use thereof, the sum of three dollars per month, and to comply with all reasonable rules and regulations in force or hereafter made by said company, not inconsistent with the laws of this State. I further agree to take good care of the telephone, and to use it for my business and convenience only.

"D. M. BRADBURY."

To this John E. Hockett, the district superintendent in charge of the company's business at Indianapolis, responded as follows :

Telephone Co. v. Bradbury.

INDIANAPOLIS, Ind., September 4th, 1885.

"D. M. Bradbury, Esq., Attorney at Law, 29½ North Pennsylvania Street, Indianapolis, Ind. DEAR SIR: As agent of the Central Union Telephone Company in this city, I have just received your letter of August 31st, 1885. It is the desire of the company to comply with your wishes, if, upon ascertaining them, it is practicable to do so. But, as your letter does not indicate with sufficient clearness what it is you request the company to do for the price indicated by you, I request, upon behalf of the company, that you indicate your wishes with more exactness. Do you desire the company to place in your office one hand telephone and cord, one magneto bell, with back board and battery box, one Blake transmitter, and one cell battery, and to connect these by wire, for your exclusive use, with the company's exchange in this city, and also to furnish with exchange service with the Indianapolis exchange subscribers, and with inspection and maintenance of lines and apparatus? Or do you desire the company to furnish you with some other and lower grade of equipment and service? Perhaps you may not be aware that the company has several grades or classes of equipment and service, and that the price depends on the character of equipment and service furnished. The hand telephone and cord, the magneto bell, with back board and battery box, and, if desired, the Blake transmitter and the cell battery, are placed in the office or place of business of the patron of the company. These are connected by wire, of which the patron has, if desired, the exclusive use, with the company's exchange in this city, and the service of connecting this wire with the wires of the subscribers of the company's said exchange is performed by the company at its exchange in this city. For the use of these instruments so placed in the office of the patron, and for the use of the wire connecting them with the company's exchange in this city, and for such exchange service, and for construction and maintenance and inspection of lines and apparatus, the company's charges are as follows: For the rental of the hand telephone, \$10 per year; for rental of the Blake transmitter, \$10 per annum; and for the additional service, material, and facilities furnished by the company, the charge to you will be (\$40) forty dollars additional per annum, the same being based upon the distance from your office to the company's exchange in this city. The hand telephone and the Blake transmitter are patented inventions, secured to the patentees by letters patent of the United States, and for the use of which the company pays royalties as licensee to patentees or their assigns. The hand telephone and Blake transmitter, two telephones, are constructed by, belong to, and are the property of, the American Bell Telephone Company, which is the owner of the patents covering them. The magneto bell is also covered by letters patent of the United States, and our company purchase them of the patentee or of his licensees, but they can only be purchased to be used in connection with telephones covered by patents owned by the American Bell Telephone Company. The charges above are reasonable, and the least amounts for which we can furnish you the instruments, connection, and service above specified. If desired by you, however, the company will

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furnish you the use of one hand telephone and cord, and one magneto bell, to be placed in your office, and a wire connection between the company's exchange in this city, and also exchange service from 7 A. M. to 6 P. M. each day, Sundays excepted, with subscribers of the Indianapolis exchange, the company reserving the right of placing other telephone subscribers upon the same wire, at its discretion, together with inspection and maintenance of the line and apparatus, and for the use of said last named instruments, connection and service, above specified, the company's charges will be at the rate of \$3 per month. Both classes of service, above mentioned, will be furnished, subject to the reasonable rules and regulations of the company.

" Please answer this letter at your earliest convenience, and indicate to us, on behalf of the company, with the necessary precision, just what you desire the company shall do.

" Yours truly,

J. E. HOCKETT,

" Agent Central Union Telephone Co."

In reply, Bradbury addressed the telephone company in the following terms :

" INDIANAPOLIS, Ind., September, 1885. .

" *To the Central Union Telephone Co.:* My demand upon you was for the use of your telephone lines in this city as was and is lawfully supplied to the superior courts of this county, and the public generally in this city, and not any partial, exceptional or qualified use.

" Resp'y,

D. M. BRADBURY."

Bradbury thereupon, in the name of the State, and upon his own relation, filed a complaint in the court below, charging that the said Central Union Telephone Company was a common carrier of telephonic messages, and that, under the act of April 13th, 1885, he had become entitled to demand and to receive from the company the highest grade or class of telephonic service for three dollars per month, and demanding that an alternative writ of mandate might be issued to said telephone company, requiring it to furnish to him such highest grade or class of telephonic service at the rate of three dollars per month, or to show cause why the same should not be done.

The company appeared to the action, and, waiving the issuance and service of an alternative writ of mandate, answered, averring that all the instruments used in its business were new and useful inventions, covered by letters

patent from the United States, and were only so used by it, as well as its patrons and subscribers, under licenses granted by the owners of such letters patent, for which it was compelled to pay large royalties; that by reason of the expensive character of its business, it could not furnish Bradbury with the highest grade or class of telephonic service at the rate of three dollars per month without an actual pecuniary loss, at the same time denying the power of the Legislature of this State to regulate the prices it may charge for the rental of telephonic instruments used by it in the prosecution of its business, or for any other service; also averring its readiness and willingness to furnish Bradbury with a hand telephone and cord, and a magneto bell, to be placed in position in his office, and connected with its exchange, and to accord to him exchange service from 7 o'clock A. M. until 6 o'clock P. M. each day, Sundays excepted, at the rate of three dollars per month; and offering to agree that a judgment to that extent might be entered against it; also denying that it was a common carrier, or amenable to the laws governing common carriers.

Issue being joined, the court below, at special term, after hearing the evidence, made a finding that Bradbury was entitled to the relief demanded by him, and accordingly entered judgment that the company should furnish to him, for his use, one hand telephone and cord, one magneto bell with back board and battery box, one Blake transmitter, and one cell battery, and accord to him all the usual exchange connections and exchange facilities, at the rate of three dollars per month; and this judgment was affirmed at general term.

Various questions were reserved at the trial, and most of the questions thus reserved have been exhaustively argued here. But the validity of the act of April 13th, 1885, in the first instance, and the meaning of the word "telephone," as used in that act, in the second instance, have been treated and practically accepted as the controlling questions in the cause. As incidental, however, to the validity of this last named act, the binding force and practical

application of so much of the act of April 8th, 1875, as relates to telephone companies, has received some attention in argument.

We held in the recent case of *Hockett v. State*, 105 Ind. 250, that the Central Union Telephone Company has become and is a common carrier of news, in the sense in which a telegraph company is a common carrier; that is to say, that, since its organization, its business has been, as is still is, to carry telephonic messages over lines of wire, erected for that purpose, and set apart to what is, in effect, a public use. Our holding in that case, also, was to the effect that the company was a common carrier, in the sense stated, on the 13th day of April, 1885, when the act of that date was passed. The same parity of reasoning requires us to hold that the company was, in like manner, a common carrier on the 8th day of April, 1885, when the act of that date went into effect. On this subject see the case of *State, ex rel., v. Nebraska Telephone Co.*, 22 N. W. Rep. 237; also *State, ex rel. v. Telephone Co.*, 36 Ohio St. 296; and *American R. Tel. Co. v. Connecticut Telephone Co.*, 44 Am. R. 237, and notes.

That the business of a common carrier of whatever class, is a public employment, and that a common carrier is required to serve all, so far as he is able to do so, and that, too, with substantial impartiality, are legal propositions too well established to require the citation of authorities; and these legal relations of common carriers to the general public were held, and we think correctly, to be applicable to telephone companies engaged in a general telephone business, by the case of *State, ex rel. v. Nebraska Telephone Co.*, above cited.

The second section of the act of April 8th, 1885, hereinabove set out, so far as it affects any question involved in this cause, is little, if anything, more than a statutory extension of the law applicable to common carriers generally, to telephone companies doing a general telephone business; and, as such telephone companies are common carriers independently of any statute, and as common

carriers are proper subjects of legislative control, we see no objection to the validity of that section. *Munn v. Illinois*, 94 U. S. 113 ; *Hockett v. State, supra*.

It was seemingly conceded at the trial, and has been impliedly so conceded in argument, that the Central Union Telephone Company might easily and conveniently have placed Bradbury in telephonic connection with its exchange and other subscribers, through the medium of then existing and contiguous lines of wire, if it and he could have agreed upon the price to be charged for the service desired. No excuse has, therefore, been presented on account of inability of the company to furnish the required service without incurring some unreasonable additional expense, or unduly extending its business.

The power of a State Legislature to regulate the prices which a telephone company engaged in a general telephone business may charge for the use of its instruments was fully and carefully considered in the case of *Hockett v. State*, above referred to, and the conclusion then reached was, that notwithstanding the patented quality of the instruments in question, the power of a State Legislature in that respect is plenary and complete. See, also, *Patterson v. Kentucky*, 97 U. S. 501. We also held, in that case, that the word "telephone," as used in the act of April 13th, 1885, had reference to an organized apparatus, or combination of instruments, usually in use in transmitting, as well as in receiving, telephonic messages, and composed of instruments similar to those enumerated in the judgment in this case at special term, and not to a single instrument technically known as a "telephone."

The construction thus placed upon the act last named continues to meet the approbation of our judgment, and may now be considered an established rule of statutory construction in this State.

The judgment is affirmed, with costs.

NOTE.— This case is cited in *Johnson v. State of Indiana, post*.
See note to *Central Union Teleph. Co. v. State, ex rel. Falley, post*.

LENSON JOHNSON v. THE STATE OF INDIANA.

Indiana Supreme Court, Jan. 24, 1888.

(118 Ind. 143.)

STATE CONTROL OF TELEPHONE RATES.—EVASION OF STATUTE.

A statute prescribing a fixed maximum rental for telephones is constitutional and valid, and cannot be evaded by charging the maximum sum for the subscriber's use, and an additional fixed sum for "non-subscribers."

Cases of this series cited in opinion: *Hockett v. State*, ante, p. 1; *Central Union Teleph. Co. v. Bradbury*, ante, p. 14.

APPEAL from Circuit Court, Knox county. Appeal from judgment convicting the owner of a telephone line of breach of a statute regulating rates, and imposing the prescribed penalty.

G. G. Reily, for appellant.

L. T. Michener, Attorney-General, *J. C. Adams*, Prosecuting Attorney, *J. H. Gillett* and *B. M. Willoughby*, for the State.

Howe, J.: In this case, appellant, Johnson, was indicted, tried by the court, and found guilty of the public offense which is defined, and its punishment prescribed, in and by the provisions of sections 1 and 3 of an act of the General Assembly of this State, entitled "An act to regulate the rental allowed for the use of telephones, and fixing a penalty for its violation," approved April 13, 1885. Acts of 1885, pp. 227 and 228. Over appellant's motion for a new trial, the court rendered judgment against him for the fine assessed and the costs of prosecution.

From such judgment, defendant has appealed to this court, and has here assigned errors which call in question

the overruling (1) of his motion to quash the indictment; and (2) of his motion for a new trial.

The indictment in this case charged that the defendant, "Lenson Johnson, on the first day of September, 1887, at said county of Knox and State of Indiana, was then and there, and now is, the proprietor, controller, and operator of a telephone line in the city of Vincennes, in the county of Knox and State of Indiana; that, as such proprietor, controller, and operator of said telephone line, he, the said Lenson Johnson, rented to one Lute Wile, of said city, for and during the month of August, 1887, one telephone, and only one, connected to and with said telephone line; that at said county of Knox, in the State of Indiana, on the first day of September, 1887, he, the said Lenson Johnson, did then and there unlawfully charge and collect from said Lute Wile for the use of said telephone, for and during the month of August, 1887, the sum of one dollar in excess of the rate fixed by law for the use of said telephone for one month, to wit, that said Lenson Johnson did charge and collect from the said Lute Wile, for the use of said telephone for and during the month of August, 1887, the sum of four dollars, contrary to the form of the statute," etc.

The question of the sufficiency of the indictment herein, the substance of which we have quoted, is not discussed by appellant's learned counsel in his brief of this cause. The error of the court below, if it were an error, in overruling the motion to quash such indictment, under the settled practice of this court, is hereby waived, and will not be considered.

Appellant's counsel "claims the reversal of the judgment, for the reason that the evidence does not tend to support the finding and judgment." Before considering the question of the sufficiency of the evidence to sustain the finding of the court, we will first set out the sections of the statute which define the public offense, for the alleged commission whereof defendant was indicted, and prescribe

the penalty therefor. In section 1 of the above entitled act, it is enacted :

“That no individual, company or corporation, now or hereafter owning, controlling or operating any telephone line, in operation in this State, shall be allowed to charge, collect or receive as rental for the use of such telephones, a sum exceeding three dollars per month, where one telephone only is rented by one individual, company or corporation. Where two or more telephones are rented by the same individual, company or corporation, the rental per month for each telephone, so rented, shall not exceed two dollars and fifty cents per month.”

Section 3 of such act reads as follows :

“Any owner, operator, agent or other person, who shall charge, collect or receive, for the use of any telephone, any sum in excess of the rates fixed by this act, shall be deemed guilty of a public offense, and on conviction shall be fined in any sum not exceeding twenty-five dollars.”

“We may premise that in the carefully considered case of *Hockett v. State*, 105 Ind. 250 (55 Am. R. 20), we held that the State has the right to prescribe the maximum rental which a telephone company, or any individual, company, or corporation owning, controlling, or operating any telephone line within the State, may charge for the use of telephones, and that the above entitled act of April 13, 1885, is a constitutional and valid law. *Hockett v. State*, *supra*; *Cent. Union Telephone Co. v. Bradbury*, 106 Ind. 1.

On the trial of this cause, Lute Wile, a witness for the State, testified that he rented of defendant, and used at his store in the city of Vincennes, Indiana, in the months of July and August 1887, one, and only one, telephone ; that on the first day of July, 1887, defendant delivered to him, witness, a printed notice in the words and figures following, to wit: (We omit this notice. It showed that defendant divided his telephone customers into six classes, charging each class, in such notice, a uniform monthly rental of three dollars, to which rental he added monthly sums ranging in the different classes from fifty cents to two dollars “per month for non-subscribers.”) Witness testified that defend-

ant put him, witness, in class 3, which thus appears in such printed notice:

“Class 3, — 75 to 90 messages per mo., \$3 per mo. rental; \$1 per mo. for non-subscribers, — \$4.”

Witness further testified that defendant subsequently collected from him, witness, four dollars per month for each of the months of July and August, 1887, for the use of said telephone; that during said months a number of business men, not connected with nor in any way interested in the business of witness in his store, where he used such telephone, used his telephone to send messages to various persons in the city about their own business; and that Coony Schafer, Egbert Bush, and any one who wished to use such telephone, came in whenever they wished, and used it in their own business. It was then admitted, for the purpose of the trial, that defendant was the proprietor of said telephone and wire. The State then put in evidence the following receipted bill, to wit:

“VINCENNES TELEPHONE EXCHANGE.

“VINCENNES, Ind., September 1, 1887.

“*Mr. L. Wile:* To telephone rental and non-sub. use, for month of Aug., \$4. Received payment. [Signed] L. JOHNSON, Prop.”

And said Wile testified that such bill was presented by defendant to him, Wile, on the first day of September, 1887, and he paid the same to defendant. And the State rested.

Defendant testified, as a witness in his own behalf, that he had charged and collected of Lute Wile four dollars for each of the months of July and August, 1887, for the use of the telephone kept by him in his store in those months; that three dollars of that sum each month was for the use of said telephone by said Wile, and one dollar each month was for the use of other persons outside of said Wile's store, and not connected in any way with his business in said store; that he made a contract and served him with the notice read in evidence in this cause; that he kept at the central station of his telephone, in Vincennes, an account of all the messages sent out from Lute Wile's

store; and that during the months of July and August, 1887, one-third of all the messages were sent out by persons outside and wholly disconnected from said Wile in his said business. This was all the evidence given in said cause.

We are of opinion that this evidence fully sustains the finding of the trial court. It clearly showed that defendant owned, controlled, and operated a telephone line in the city of Vincennes, in this State; that, in connection with such telephone line, he rented one telephone, and only one to Mr. Lute Wile, of such city, for use in his store; and that he charged, collected, and received from Mr. Wile a rental, for the use of such telephone, a sum exceeding three dollars per month, to wit, the sum of four dollars per month. Defendant was clearly guilty, therefore, of the public offense which is defined in and by the above entitled act. It is true that defendant divided the monthly sum of four dollars, which he charged and collected from Mr. Lute Wile, for the use of "one telephone only," into two items, one of which he designated as rental and the other as a monthly charge "for non-subscribers;" but, divided the four dollars as he might, and designated the items as he might, the fact remains and is apparent that defendant thereby "charge, collect, or receive, for the use of one telephone only, a sum in excess of three dollars per month to wit, the sum of four dollars per month. Having done this, the statute says he "shall be deemed guilty of a public offense," etc.

It will be observed that defendant's charge of one dollar per month, for the use of the telephone by non-subscribers is as fixed as the rental charge, and is charged for each and every month, whether the telephone is used by non-subscribers or not, and without regard to the number of subscribers who may use such telephone.

We find no error in the record of this cause.

The judgment is affirmed, with costs.

NIBLACK, J., took no part whatever in the consideration or decision of this cause.

NOTE.— See note to next case.

Telephone Co. v. State, ex rel. Falley.

**CENTRAL UNION TELEPHONE COMPANY v. THE STATE, EX
REL. SUSANNA B. FALLEY.**

Supreme Court of Indiana, Jan. 22, 1889.

(118 Ind. 144.)

**TELEPHONE COMPANY.—DISCRIMINATION.—CONTROL OF RATES BY STATE.—
MANDAMUS.**

The telephone is an instrument for commerce, and persons engaged in the general telephone business are common carriers of news.

In Indiana, such companies, with wires wholly or partly within the State, and engaged in a general telephone business, are by statute compelled to furnish their facilities within their local limits, without discrimination, to all persons desiring them and willing to abide by the reasonable regulations of the company.

By another statute, a maximum charge for telephone rental is prescribed. Held, that it was within the power of the legislature to enact the latter statute.

That said statute could not be evaded by changing from a "rental exchange" to a "public toll station" system.

That it was the intention of the legislature in enacting the two statutes, that they should be construed together, and that persons should be entitled to the facilities provided for by the one statute at the maximum rate fixed by the other.

Said statutes are not void as interfering with interstate commerce, although the lines of the company extend through various other States, since they seek to control the service only within the State of Indiana.

The fact that a penalty is provided in the statute conferring the right to facilities does not abridge or take away the remedy by mandamus.

Cases of this series cited in opinion: *Cent. Un. Teleph. Co. v. Bradbury*, ante, p. 14; *State v. Nebraska Teleph. Co.*, vol. 1, p. 700; *Hockett v. State*, ante, p. 1; *W. U. Tel. Co. v. Pendleton*, vol. 1, p. 632; *State v. Bell Teleph. Co.*, vol. 1, p. 299, *Bell Teleph. Co. v. Commonwealth*, post.

APPEAL from judgment of Tippecanoe Circuit Court awarding the appellee a peremptory writ of mandate, commanding appellant to furnish her a telephone with proper facilities for its use. The facts are stated in the opinion.

Telephone Co. v. State, ex rel. Falley.

J. R. Coffroth, T. A. Stuart and A. A. Thomas, for appellant.

W. D. Wallace, S. P. Baird and F. S. Chase, for appellee.

OLDS, J.: This is an action, brought by the relatrix, to compel the appellant, by mandate, to furnish her, at her place of business in the city of Lafayette, a telephone and telephonic connections and facilities. The petition is in one paragraph, averring the following facts: That the defendant, the Central Union Telephone Company, is a corporation duly organized under the laws of the State of Illinois; that it is now, and was at the time of the doing of the acts and things hereinafter complained of, and for three years last past has been, owning and operating a system of telephone lines and wires, and engaged in doing a general telephone business in the city of Lafayette, county of Tippecanoe, State of Indiana; that the relatrix, Susanna B. Falley, is now, and for more than three months last past has been, carrying on business under the name and style of the "Falley Hardware Company," and the occupant of a business room in said city, at numbers 37 and 39 on South Third street therein, and her business room is within the limits of the defendant's telephone business in said city; that the relatrix did, on the 25th day of October, 1887, demand of the defendant that said relatrix be furnished by said defendant with a telephone and telephonic connections and facilities necessary to place the relatrix, at her said business room, in telephonic connection with the patrons of defendant in said city; that the relatrix did then, and at the time of making said demand, tender to the defendant the sum of nine dollars, lawful currency of the United States, as a rental in advance for such telephone, telephonic connections and facilities, for the first three months' use thereof, and at the same time relatrix offered to comply with the reasonable rules and regulations of said defendant, not inconsistent with the laws of this State; that the

defendant, at the time said demand was made, refused, and ever since has wilfully, wrongfully and without cause, failed and refused, and still fails and refuses, to furnish to said relatrix, at her said business room, the use of such telephone and telephonic connections and facilities; that the defendant is a common carrier of telephonic messages between its patrons within the limits of said city of Lafayette, and the said relatrix, under the laws of the State of Indiana, is entitled to demand and receive from the defendant the use of the telephone and telephonic connections, facilities and service, necessary to place the relatrix, at her said business room, in telephonic communication with the patrons of defendant in said city, for the compensation of three dollars per month, as fixed and prescribed by the statutes of said State, and for such compensation she is entitled to receive from the defendant the use of a telephone, and the highest and best grade of telephonic connections, facilities and service, used and furnished by said defendant in carrying on its business in said city. Prayer for an alternative writ of mandate, and, on final hearing, a peremptory writ compelling defendant to furnish relatrix with such telephone and telephonic connections, facilities and service, which petition was duly verified. Alternative writ of mandate issued upon the complaint in due form, setting forth the filing of the complaint and the allegations of the complaint, and concluding by commanding the appellant to furnish the relatrix with a telephone and telephonic connections and facilities as asked, or in default thereof to appear before the court and show cause.

In answer to the writ, appellant appeared by attorneys and demurred to the writ for the cause that the writ did not state facts sufficient to constitute a cause of action, which demurrer was overruled, to which ruling of the court on the demurrer appellant excepted. Appellant then filed an answer in five paragraphs. The first is a general denial, and the other paragraphs allege the following facts:

2nd. The defendant avers that it is a corporation, under the laws of Illinois; that for several years prior to the

demand by plaintiff, as alleged in the complaint, defendant had been engaged in carrying on its business as a telephone company in the States of Indiana, Ohio, Illinois and Iowa; that long before, and at the time of, the happening of the things complained of in plaintiff's complaint, defendant had, ever since had, and now has, its lines and wires on its poles in the city of Lafayette, and in various cities and towns in the States aforesaid, and during all of said time, and still has, offices in said various cities and towns in each of said States, connected with each other, and many of its offices and telephones in this State are connected by means of its wires with defendant's offices and instruments in the States of Ohio, Illinois and Iowa; that defendant, during all of said time, was, has been, and is engaged in transmitting messages for the public for hire over its said wires, not only between towns and cities in each of said States, but also between the several States aforesaid; and during all of said time defendant has been, and is, engaged in, and carrying on, interstate commerce; that it admits that plaintiff, claiming that, under the act of the General Assembly of the State of Indiana, she was entitled to have a telephone in her store, and to be furnished with telephonic service under said law, tendered defendant nine dollars and demanded to have a telephone in her store; and defendant admits that it refused to furnish relatrix with a telephone, and with telephonic connections and service, because if defendant had complied with said request and demand she would thereby be furnished facilities for transmitting messages from Lafayette to various places in the States of Ohio and Illinois, where defendant had and has its wires and offices, as aforesaid, for said sum of money, which was unreasonable and greatly less than defendant charges its other customers, and which, as defendant was engaged in carrying on interstate commerce, could not be required of it.

3rd. The third paragraph states that it, defendant, is a corporation under the laws of Illinois, and is engaged in carrying on a general telephone business in the city of

Lafayette; that, on the 2nd day of March, 1886, it in good faith announced to the public, and it was then its intention, from and after the 2nd day of March, 1886, not to furnish telephones under a rental system, except as it did so until its contracts then in existence expired; that at said time it had a large number of contracts with its various subscribers in the city of Lafayette for the use of its telephones, by the terms of which defendant was compelled to maintain its exchange in said city, and furnish telephone facilities to said persons until the 30th day of September, 1886; that defendant treated all applications for telephones and telephonic service alike; that, in good faith, and without discrimination, having determined to cease doing a general rental telephone exchange business in this State, it refused to furnish telephones and telephonic connections under a general rental telephone exchange system, except to those with whom it had contracts, as aforesaid; that it admits the demand and tender by relatrix, and the refusal by defendant to furnish her with a telephone, because it had determined to cease, and had in fact ceased, doing a general rental telephone exchange business in said city, and so informed relatrix, and since that time has not been, and is not, engaged in a general telephone business under a rental system in said city; that after it had announced its determination to cease doing a general rental telephone exchange business, it, in June, 1886, determined to offer to the public, and did in fact offer to the public, to furnish telephonic service and connections by means of public toll-stations at various points in said city, which system of public toll-stations defendant had in operation at and long before the time of the demand by relatrix for telephone and telephonic connections. Defendant denies that it owns or operates a telephone exchange under the rental system in said city of Lafayette, Indiana, or that it did at the time of the commencement of this action; that, although it had formerly conducted a telephone exchange under the rental system, it abandoned and terminated the same as soon as its contracts in existence were terminated. The defendant

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avers that what is known as a telephone exchange under a rental system, is where lines and telephone instruments are furnished to subscribers for private use, under contracts limiting the use of the facilities furnished to such subscribers and their employees, for a stipulated rental per month, quarter or year, and in which the instruments furnished pass into the possession of such subscribers; the lines so furnished to subscribers center at the switching station, where the line of any subscriber is connected with that of any other subscriber, on request, for purposes of communication, authorized by the contract. In the exchange system, a set of telephone instruments, connected by a wire with the central station, is furnished to any reputable person who desires to become a subscriber to the exchange, and signs the usual form of contract, and complies with its conditions. A public toll system of telephone service is one where the telephone company furnishes no instruments or lines for private use for a rental charge, but establishes stations of its own, for the accommodation of the public, in such places as may appear to it necessary to furnish telephonic facilities and connections to the public, charging a toll for each use of its instruments and lines, such toll stations being in charge of agents selected, appointed and paid by the telephone company, the instrument at such station remaining in the possession and control of the company, through its agents; the lines from such stations extend to a switching station, where one is connected with another upon the order of any agent, which agent collects from the user the toll charged for each and every connection, and accounts for the same to the company; that such toll system is simply an extension of the toll system which the defendant, since its organization for some years past, and prior to the enactment of the telephone statutes in this State, was maintaining, and has maintained, in various towns in this State, providing telephonic facilities between individuals residing in different towns where toll stations are established; that, at the time of the commencement of this suit, it did not, does not now, nor does it intend to,

discriminate against the relatrix, and is still, and now is, ready and willing to supply the relatrix, and all applicants, with such facilities as it has in said city.

The paragraph further sets out in detail the manner of operating and conducting the toll-station system, and alleges that all its business in the city of Lafayette, at the time of the commencement of this suit, and ever since, has been conducted on that system, and that it was not at that time, nor since, doing, and does not intend to do, a telephone business under the rental system; that notices of the rates and fees charged for the use of the telephones are posted in each station. A copy of the contract that it enters into with its agent is set out. The answer denies any discrimination against the relatrix, or any intention to discriminate, and alleges that the toll stations are so distributed as to accommodate the general public, and that there are a number in the vicinity of the place of business of the relatrix, and denies being a common carrier, and denies being bound to rent telephones at all, or as demanded by relatrix; that defendant offered to establish a toll station on relatrix's said premises, and she refused to allow it to be done, or to sign a contract of agency.

The following is a copy of the contract set out with this paragraph of answer:

"CENTRAL UNION TELEPHONE COMPANY—STATION CONTRACT—CENTRAL STATION.

"This agreement, made this.....day of....., 188..., by and between the Central Union Telephone Company, its successors or assigns, party of the first part, and.....party of the second part, witnesseth: The second party agrees: 1st. To permit the party of the first part to place its wires, fixtures, telephone instruments and apparatus in and upon the premises of the second party, located on.....street, in the.....of....., county of....., in the State of Indiana, for the purpose of doing a general telephone and telegraph business; that he,....., said second party, is to furnish proper office room, rent, light and fuel, and necessary employees to transact all business of the party of the first part, at said station, in a prompt and business-like manner; to collect for all such business such regular rates as may be fixed from time to time by the party of the first part, and the same to account for to the said first party; and further, to observe and conform to such rules and regulations, touching said business, as may,

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from time to time, be prescribed by said first party. In consideration thereof, and in full payment therefor, the first party agrees to pay to the second party five per cent. commission upon the receipts at said station for business with regular stations within...miles of the county courthouse, in said....., and.....upon receipts for business going over the extra territorial lines of the first party. It is further mutually agreed that should the telephone or telegraph station, herein referred to, fail to be sufficiently remunerative, or its management by the party of the second part prove to be unsatisfactory to the party of the first part, the right to terminate this agreement, at any time, is reserved by the party of the first part; but otherwise, this agreement is to be in force and effect until the last day of....., 188.., and thereafter until the party of either part shall have given the party of the other part ten days' written notice of its desire to discontinue the same. Witness the hands of the parties etc.

4th. The fourth paragraph alleges the ceasing to do business by the defendant under the rental system and conducting the same under a toll-station system, as alleged in the third paragraph, and avers that one Edward Falley is a partner of relatrix, and that they are trading under the name of "Falley Hardware Company," and that prior to the demand by relatrix for a telephone, as set forth in the complaint, defendant had a telephone in their place of business under the toll-station system, and said firm acted as the agent of defendant in the operation of said telephone; that said firm terminated said contract of agency and the relatrix then made the demand as alleged, whereupon defendant refused for the reasons as stated in the third paragraph of answer.

The fifth paragraph is not in the record.

Appellee filed separate demurrers to the second, third, fourth and fifth paragraphs of answer for the cause that neither of said paragraphs stated facts sufficient to constitute a defense or return to said alternative writ of mandamus.

The first paragraph of answer was withdrawn by appellant, and the court sustained the demurrers to the second, third, fourth and fifth paragraphs; to which ruling on appeal the court, in sustaining the demurrers to the several paragraphs of answer, appellant duly excepted, and appellant filed

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to amend or plead further, the court rendered judgment on said demurrers, ordering and adjudging that a peremptory writ of mandate issue, commanding appellant to forthwith furnish and supply relatrix, at her business rooms, numbers 37 and 39 South Third street, in the city of Lafayette, Indiana, with a telephone, and with the highest and best grade of telephonic connections and facilities and service used, furnished and employed by said appellant in carrying on its said business in said city, and that might be necessary to place her, at her said place of business, in telephonic communication with all persons in said city having at their places of business or residences telephones placed and maintained there by said appellant; and that said appellant continue to supply and furnish the same, etc., so long as appellant shall continue to carry on a general telephone business in said city, and so long as relatrix shall continue to observe the reasonable rules, etc., and pay the compensation of three dollars per month. To the rendering of which judgment the appellant excepted. Appeal prayed and granted to this court. Errors are properly assigned on the rulings of the court.

This action is brought under the acts of 1885, prescribing the duties of telephone companies, and to regulate the rental to be paid for the use of telephones, and requires a construction of these acts. On April 8th, 1885, the following law was enacted :

“An act prescribing certain duties of telegraph and telephone companies, prohibiting discrimination between patrons, providing penalties therefor, and declaring an emergency.”

Section 1. Relates exclusively to telegraph companies.

“Sec. 2. Every telephone company, with wires wholly or partly within this State, and engaged in a general telephone business, shall within the local limits of such telephone company's business supply all applicants for telephone connections and facilities with such connections and facilities without discrimination or partiality, provided such applicants comply or offer to comply with the reasonable regulations of the company; and no such company shall impose any conditions or restrictions upon any such applicant that are not imposed impartially upon all persons or companies in like situation, nor shall such company discriminate against any

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individual or company engaged in any lawful business, or between individuals or companies engaged in the same business, by requiring as a condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise for any lawful purpose.

“Sec. 3. Any person or company violating any of the provisions of this act shall be liable to any party aggrieved in a penalty of one hundred dollars for each offence, to be recovered in a civil action in any court of competent jurisdiction. *Provided*, nothing in this act shall be construed to take away or abridge the right of such aggrieved party to appeal to a court of equity to prevent such violations or discriminations, by injunction or otherwise.” Acts of 1885, p. 151.

On the 13th of April, 1885, another law was enacted which is as follows :

“An act to regulate the rental allowed for the use of telephones, a fixing a penalty for its violation.

“Section 1. That no individual, company or corporation, now or hereafter owning, controlling or operating any telephone line in operation in this State, shall be allowed to charge, collect or receive as rental for use of such telephones, a sum exceeding three dollars per month where a telephone only is rented by one individual, company or corporation. Where two or more telephones are rented by the same individual, company or corporation, the rental per month for each telephone so rented shall exceed two dollars and fifty cents per month.

“Sec. 2. Where any two cities or villages are connected by wire operated or owned by any individual, company or corporation, the price for the use of any telephone, for the purpose of conversation between such cities or villages, shall not exceed fifteen cents for the first five minutes, and for each additional five minutes no sum exceeding five cents shall be charged, collected or received.

“Sec. 3. Any owner, operator, agent or other person, who shall charge, collect or receive for the use of any telephone any sum in excess of the rates fixed by this act, shall be deemed guilty of a public offence, and on conviction shall be fined in any sum not exceeding twenty-five dollars. Acts of 1885, p. 227.

This act took effect July 22nd, 1885.

It is insisted by appellant that the act of April 8th is simply an act prohibiting discriminations by telephone companies, and providing a penalty for any discrimination by such companies, and that the act of April 13th prescribes the price which may be charged for the rental of telephones, when the same are rented, and prescribes penalties for asking or taking a greater rental, and

unless they inhibit all other systems or methods of telephony, other than the rental, this case was decided wrongly by the court below; and that the title to the act of April 8th declares it to be an act prohibiting discrimination between patrons, and prescribing penalties therefor.

It is further claimed by appellant that the answers show that appellant was not engaged in a general telephone business at Lafayette at the time of appellee's demand, but was engaged only in a limited business, and that it offered to furnish appellee such limited service, and has in all respects offered to treat her in the same manner as it was treating its other patrons, but that she wanted a different service than that in which appellant was engaged; in other words, she wanted appellant to discriminate in her favor, and to grant her demand would make appellant amenable to the law against discrimination.

In determining this case it is important to consider the nature of the telephone, how operated, the utility of it, and the rights of the parties in the absence of the statutes enacted by the legislature. The telephone differs from the telegraph very materially, in this, that the transmission of news, the sending and receiving of messages by telegraph, can only be done by those having a knowledge of the business, and having a knowledge of the art and science of telegraphy. To others, who are not telegraphists, the telegraph would be useless. It is, therefore, only beneficial to the general public when operated by persons or companies keeping in their employ telegraphists, to send, receive and transmit messages, and messengers to deliver them to persons to whom addressed. A telegraphic instrument in the house or place of business of a patron of the company, connected with the wires of the company, with facilities for transmitting and receiving messages by telegraph, would be of no use to a patron, unless he was learned in the art of telegraphy. But the telephone is entirely different; a telephone, with proper connections and facilities for use, can be used by any person; it requires no experience to operate

it. Webster defines it as "An instrument for convey sound to a great distance."

In the case of the *Central Union Telephone Co. v. Bradbury*, 106 Ind. 1, the word "telephone," as used in the act of April 13th, 1885, was held to mean "an organized apparatus, or combination of instruments, usually used in transmitting, as well as in receiving, telephonic messages." By the use of the telephone, persons are enabled to converse with each other while in their respective business houses or residences, a great distance apart. Although of recent date, it has become of important use in the transaction of business, and there is no other instrument or device to supply its place. While it may not supplant and take the place of the telegraph in many instances for many purposes, yet in others it far surpasses it, and can be put to many uses for which the telegraph is not fitted, and by persons wholly unable to operate and use the telegraph. It has been held universally by the courts, considering its use and purpose, to be an instrument of commerce and a common carrier of news, the same as the telegraph, and by reason of being a common carrier, it is subject to proper obligations and to conduct its business in a manner conducive to the public benefit, and to be controlled by law. To conduct the business of the telephone by means of telephone stations and by sending messengers to persons with whom a patron of the company desires to converse in other parts of the city, to compel the person desiring to converse with others to remain at the telephone station until the person with whom they desire to converse can be notified and so arrange their business to leave and go to another telephone station and have their conversation, renders the use of the telephone worthless. It is by reason of the fact that business men can have them in their offices and residences, and, without leaving their homes or their places of business, converse with another at a great distance with whom they have important business, and converse without the loss of valuable time on the part of either, that the telephone is part

valuable as an instrument of commerce. It being an instrument of commerce, and persons or corporations engaged in the general telephone business being common carriers of news, what are the rights of the public, independent of the statute, as regards discrimination?

Any persons or corporation engaged in telephone business, operating telephone lines, furnishing telephonic connections, facilities and service to business houses, persons and companies, and discriminating against any person or company, can be compelled by mandate, on the petition of such person or company discriminated against, to furnish to the petitioner a like service as furnished to others. This has been held in the cases of *State v. Nebraska Telephone Co.*, 17 Neb. 126; *Vincent v. Chicago, etc. R. R. Co.*, 49 Ill. 33; *People v. Manhattan Gas Light Co.*, 45 Barb. 136. And the principle held in these cases is in accordance with the well settled rules governing common carriers.

It is not controverted in the argument by counsel for the appellant that the legislature had the right to regulate the price to be charged and collected for the use of telephones and telephonic connections, facilities and service; and even if it were controverted, it is well settled by authorities that the legislature has the right to do so, relative to the business conducted within the State. *Hockett v. State*, 105 Ind. 250; and *Central U. Tel. Co. v. Bradbury*, *supra*, and authorities cited in those cases; *Johnson v. State*, 113 Ind. 143; *Munn v. Illinois*, 94 U. S. 113; *Ouachita v. Packet Co. v. Aiken*, 121 U. S. 144; *Patterson v. Kentucky*, 97 U. S. 501.

The telephone company being liable for discriminating between persons and companies, and the person or company discriminated against having a remedy without the enactment of section 2 of the act of April 8th, 1885, there was no occasion for the statute on that account alone. Then what was the purpose and object of the two statutes set out?

It should be presumed the legislature had some purpose and object. If section 2 of the act of April 8th was only to prevent discrimination, and section 1 of the act of April 13th, only to fix the price for the rental of telephones when the

telephone company was operating under a rental system, then all that the companies operating telephone lines would have to do would be to cease to operate their business under a rental system, and charge so much for each conversation; or, as they have done in this case, establish public telephone stations, and then charge for each separate use of the telephone, and they might thereby derive a greater income for the use of the telephone, and render to the public much inferior service, and yet avoid liability under the statute. We do not think such was the object or purpose of the statute, or that such construction can be placed upon it.

It was the evident intention of the legislature that where a telephone company was doing a general telephone business in this State, any person within the local limits of its business in a town or city should have the right to demand and receive a telephone and telephonic connections, facilities and service, the best in use by such company, and should only be liable to be charged and to pay three dollars per month therefor. With this construction only are the statutes of any benefit to the citizens of the State. The legislature fixed what, in the judgment of that body, was the maximum price that should be charged for the service, and placed it in the power of each individual, and gave him the right to demand and receive such service within the limits of the company's business, in any town or city where such company is doing a general telephone business.

It is insisted, as it appears by the answer, that the lines of the appellant extended through the States of Ohio, Indiana and Illinois; that appellant was engaged in interstate commerce; that it was a common carrier of news between the States, and that therefore such statutes are an interference with interstate commerce. We cannot agree with that theory. These statutes simply provide that telephone companies shall provide persons within this State with certain service, and for such service shall receive a certain compensation. They only seek to control the service within this State. If section 2 of the act of April 13th, providing for the

price to be paid for connections between two cities or villages, should be construed to apply to two cities or villages, one of which was without this State, then there would be some question as to the validity of that section, or the power of the legislature to control the price to be paid for a message or the use of the telephone for communicating with a person beyond the limits of the State; but that question is not involved in this case, as one section of a statute may be valid and another not. Telegraph companies stand upon a different footing, in some respects, from that of telephone companies; they have been granted some rights and privileges by acts of Congress which cannot be abridged or interfered with. In the case of *Western U. Tel. Co. v. Pendleton*, 122 U. S. 347, referred to by counsel for appellant, it was held that the act was void in so far as it sought to govern the delivery of messages outside of the State. *State v. Newton*, 59 Ind. 173.

It is also contended by counsel for appellant that, as the statute provides a remedy other than that by mandate for a violation of the statute, the writ of mandate is not a proper remedy.

The right to have the telephone and telephonic connections and facilities is a right given by the statutes. It is a legal right, which may be enforced by mandate. No remedy is adequate which does not give the person that to which he is entitled by law; the penalty of one hundred dollars is cumulative, and does not abridge or take away the right to a writ of mandate. The statute itself provides that the act shall not be so construed as to "abridge the right of such aggrieved party to appeal to a court of equity, to prevent such violations or discriminations, by injunctions or otherwise." The statute should be so construed as that the penalty shall not take away any of the other remedies the aggrieved person may have, one of which remedies is by writ of mandate. This court held, in the case of *Central U. Tel. Co. v. Bradbury*, *supra*, that Bradbury was entitled to his remedy by writ of mandate compelling the company to furnish him with a telephone and telephonic service.

The right to a writ of mandate requiring telephone companies to furnish telephonic service to persons entitled thereto has been held in *State v. Telephone Co.*, 36 Ohio St., 296, also by the Supreme Court of Pennsylvania, in *Bell Telephone Co. v. Commonwealth*, 3 Atlantic Rep. 825. In this case the complaint states a good cause of action under the statutes.

The second paragraph of the answer alleges the conducting of the defendant's business in the several States, and that it is engaged in interstate commerce, and that to furnish relatrix with an instrument and connections with its lines would put her in connection with its office outside of the State and furnish her facilities for transmitting messages from Lafayette to various places in Ohio and Illinois, where the appellant has its wires and offices. This paragraph does not controvert the facts alleged in the complaint, that appellant, at the time of the acts and things complained of, etc., was owning and operating a system of telephone lines and wires and engaged in doing a general telephone business in the city of Lafayette, and that the place of business of the relatrix is within the limits of the appellant's telephone business in said city; and it must also be remembered that the demand, as alleged in the complaint, was only that she be furnished with a telephone and telephonic connections and facilities necessary to place her, at her said store, in telephonic communication with patrons of appellant in said city. The statute contemplates two kinds of service and different compensations for each; one, connections and facilities for conversing with patrons of the company within any city or town where an exchange is maintained; the other, for conversing between two towns or cities.

The other paragraphs show the appellant to have been engaged in a general telephone business in said city, operating the same under a toll system at the time of the demand and tender by relatrix, and do not controvert the allegations in complaint that the plaintiff's place of business is within the local limits of appellant's business in said

city. Neither of the paragraphs of answer is sufficient.

Under the construction we have given the statutes, there was no error committed by the court below in overruling the demurrer to the complaint, sustaining the demurrers to the answers or in granting the writ of mandate.

The judgment is affirmed, with costs.

Petition for a rehearing overruled April 3. 1889.

NOTE.—*Central Union Telephone Co. v. Falley*, 118 Ind. 598, was between the same real parties and grew out of the same transaction as the case above reported. It was brought to recover the penalty of \$100. provided by § 3 of the Act of April 8, 1885, contained in the foregoing opinion.

The following is the opinion in full:

“OLDS, J.: This action was brought by the appellee against the appellant under the act of April 8, 1885, entitled ‘An Act prescribing certain duties of telegraph and telephone companies, prohibiting discrimination between patrons, providing penalties therefor, and declaring an emergency,’ for the penalty of \$100, for the failure and refusal on the part of the appellant to furnish to the appellee telephone and telephonic connections, facilities and service, and involves the same questions that were decided in *Central Union Tel. Co. v. State, ex rel.*, 118 Ind. 194.

On the authority of that case, the judgment of the court below is affirmed, with costs.”

The above case, and the four cases above reported, are, I believe, the only ones decided involving a consideration of the Indiana statute limiting telephone rates. They illustrate a variety of ingenious defenses and devices to avoid the statute, all of which proved futile.

The statute was, however, repealed in 1889. (Acts 1889, p. 49.)

In Maryland, by a statute enacted in 1892, telephone rates are limited to \$3.50 per month for all subscribers within two miles of central stations, and one dollar per month for every additional mile. (Chaper 387.)

In the case next following, *St. Louis v. Bell Teleph. Co.*, it is assumed by the Supreme Court of Missouri that the State has the power to limit telephone rates, and to delegate such power to municipal corporations. The only question considered was whether such power had been delegated in the given case.

See INDEX to vol. 1, title, “Poles and Wires in Streets: Municipal Control of.”

THE CITY OF ST. LOUIS v. THE BELL TELEPHONE COMPANY.*Supreme Court of Missouri, December 20, 1888.*

(98 Mo. 623.)

MUNICIPAL CONTROL OF TELEPHONE RATES.

Assuming that there is power in the legislature of Missouri, both to regulate telephone rates and to authorize cities to regulate them, held, that the municipal authorities of the city of St. Louis have no power, by charter or otherwise, to fix or limit the rates of charges of telephone companies doing business within the limits of the city.

Case of this series cited in opinion: *Julia Building Association v. Bell Teleph. Co.*, vol. 1, p. 801.

APPEAL by the defendant below from a judgment of conviction rendered in the St. Louis Court of Criminal Correction.

Hitchcock, Maddill & Finkelnburg, for appellant.

Leverett Bell, for respondent.

BLACK, J.: This was a prosecution against the Bell Telephone Company of Missouri for the violation of an ordinance which provides that "the annual charge for the use of the telephone in the city of St. Louis shall not exceed fifty dollars." A violation of the ordinance is made a misdemeanor, and subjects the offender to a fine of not less than fifty dollars nor more than five hundred dollars. The defendant appealed from a judgment assessing a fine of three hundred dollars against it.

The defendant is a corporation organized under article 8 of chapter 21 of the Revised Statutes of this State, and hence has all the powers therein conferred upon such corporations. Among others they have the power to own and

operate lines of telephone, to make such reasonable charges for the use of the same as they may establish, to erect their poles along and across public roads and streets, to condemn private property for a right of way, and they are charged with the duty of receiving and transmitting messages with impartiality and in good faith. The defendant neither affirms nor denies the power of the State itself to fix a maximum rate of charges, but does contend that no such power has been delegated to the city of St. Louis. The defendant's property, consisting of poles, wires, fixtures, and the like, is, of course, private property; but the property is devoted to public use, and since the defendant has conferred upon it special franchises and privileges, including the right of eminent domain, the corporation is subject to public regulations; and we shall take it for granted that the State has the power to fix and prescribe a maximum rate for telephone service.

That this power could be delegated to municipal corporations is equally clear. The ordinances of the city of St. Louis must not be in conflict with the general laws of the State. If the city has had this power to fix rates conferred upon it, then an ordinance which fixes reasonable maximum rates would not be in conflict with the law under and by virtue of which the defendant is organized, and which law constitutes its charter. A telephone company, when once its poles are planted and wires stretched on or over the streets of a city, becomes in effect a monopoly, and the company must submit to such reasonable regulations as the municipal corporation has power to prescribe.

The important question, then, is whether the city of St. Louis has the power to enact the ordinance in question, the power to fix reasonable maximum charges for telephone service, and nothing to the contrary being shown in this case, it is assumed that the rate fixed is reasonable, so that the question is narrowed down to one of power on the part of the city to fix telephone rates at all. If the city has such power, it must be found in a reasonable and fair construction of its charter. Judge Dillon makes this

full and comprehensive statement of the rule as to municipal powers: "It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers and no others*: (1) Those granted in *express words*; (2) those *necessarily or fairly implied* in or *incident* to the powers expressly granted; (3) those *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied." 1 Dill. Mun. Corp, (3 ed.), sec. 89; see also *St. Louis v. McLaughlin*, 49 Mo. 562. The rule, as before stated, is in accord with what we said in the *City of St. Louis v. Herthel*, 88 Mo. 128.

The city places some reliance on its general power to regulate the use of the streets. This power extends to new uses as they spring into existence from time to time, as well as to uses common and known at the time of the dedication or grant of the power to the municipal corporation. *Ferrenbach v. Turner*, 86 Mo. 416. The erection and maintenance of telephone poles is one of these new uses, and is a proper use of the streets. *Julia Building Ass'n v. Bell Telephone Co.*, 88 Mo. 258. That the company is subject to reasonable regulations prescribed by the city, as to planting its poles and stringing its wires and the like, is obvious. Such regulations have been obeyed by this defendant.

Conceding all this, we are at a loss to see what this power to regulate the use of the streets has to do with the power to fix telephone charges. The power to regulate the charges for telephone service is neither included in nor incidental to the power to regulate the use of streets, and the ordinance cannot be upheld on any such ground.

By the fifth subdivision of section 26, article 3, of the charter of St. Louis, the mayor and assembly have power "to license, tax and regulate lawyers, doctors, etc., etc., telegraph companies or corporations, etc., etc., and all other business, trades, avocations or professions whatever." Telephone companies are not mentioned, though a vast

number of trades, professions and avocations are specified. They are not mentioned in all probability because not existing at the date of the charter. In construing this paragraph of the charter we held in the case of *City of St. Louis v. Herthel, supra*, that architects were, for purpose of construction, *ejusdem generis* with lawyers, doctors, dentists and artists, and, therefore, included by the general concluding words. So in this case it may with equal propriety be said that telephone companies are *ejusdem generis* with telegraph companies, and, therefore, included in the words of the general concluding clause.

It can make no sort of difference that these telephone companies were not in existence at the date of the charter. One of the objects had in view by the use of the general clause was to provide for just such cases. As aptly observed in that case (*City of St. Louis v. Herthel, supra*), "we are to construe it (the charter) according to the intent of the framers, and that intent must be gathered from the language and object of the charter provisions and giving that language an interpretation neither strict nor strained."

Does, then, the power to regulate telephone companies, when that term is coupled with the powers to license and tax, give the city the power to regulate the charges for telephone service? By the general statutes of Massachusetts of 1860, page 167, it is provided that the mayor and aldermen of any city may make rules and orders for the regulations of carriages, and may receive one dollar annually for each license granted to a person to use a carriage in the city. Under this power, it was held, in *Commonwealth v. Gage*, 114 Mass. 328, that a city might fix the compensation to be charged by hackney coachmen. That case would at first seem to furnish some authority for the claim made by the city in this case. Turning to other provisions of the charter, however, we find that express power is given to establish ferry rates; to fix the rates for carriage of persons, and of wagonage, drayage, and cartage of property; to regulate the price of gas, and to regulate and control railways within the city as to their fares, hours and frequency

of trips. These express powers to fix prices, fares, and charges, in these specified cases, are followed by no general words. With this specific enumeration of cases where the city may regulate the compensation to be charged, it impliedly appears that such a power was not intended to be given in other cases. This conclusion presents itself with more force when we see that by the clause before quoted, the city has power to license, tax and regulate private carriages, omnibuses, carts, drays, and other vehicles; so that the framers of the charter did not regard the power to license, tax and regulate sufficient to give the power to fix rates and charges.

The power to "regulate," it may be conceded, gives the city the right to make police regulations as to the mode in which the designated employment shall be exercised. 1 Dill. on Mun. Corp. sec. 358. But taking these charter provisions together, we think it would be going to an extreme length to say that they confer upon the city the power to fix telephone rates. If it has power to do this, it may also fix the charges for telegraph services and for the other designated services which are of a public character. We conclude that the city has no power to pass the ordinances in question by reason of any of the charter powers before considered.

This brings us to the general welfare clause, which is in these words: "Finally, to pass all such ordinances, not inconsistent with the provisions of this charter, or the laws of the State, as may be expedient, in maintaining the peace, good government, health, and welfare of the city, its trade, commerce and manufactures, and to enforce the same by fines," etc. Sometimes the power to enact ordinances is given in general terms, and in other cases there is a specific enumeration of the powers. "This difference," says Dillon, "is essential to be observed, for the power which the corporation would possess under what may be termed the 'general welfare clause,' *if it stood alone*, may be limited, qualified, or, when such intent is manifest, impliedly taken away by provisions specifying the partic-

ular purposes for which by-laws may be made." 1 Dill. Corp. (3 ed.), sec. 315.

Under a general power like the one now in question this court has held that the city may pass ordinances concerning vagrants, prohibiting persons from keeping open their places of business on Sunday, and prohibiting cruelty to dumb animals. *St. Louis v. Schoenbush*, 95 Mo. 618, and cases cited. These matters are all police regulations strictly speaking, and naturally fall within the domain of municipal legislation and regulation. To say that under this general power the city may fix rates for telephone services would be going entirely too far. This conclusion is manifest when we consider that the charter points out with particularity those cases in which the city may fix rates and charges. What has been said in respect to the power to license, tax, and regulate, applies with equal force here. We are not cited to, nor have we found, any adjudicated case which will support the ordinance now under consideration under the present charter powers of the city of St. Louis.

The judgment in this case is, therefore, reversed.

RAY, J., absent. The other judges concur.

NOTE.—See note to *Central Un. Teleph. Co. v. State, ex rel. Falley ante*, p. 48.

WESTERN UNION TELEGRAPH CO. v. WILLIAM PENDLETON.

U. S. Supreme Court, May 27, 1887.

(122 U. S. 347 ; reversing 1 Am. Elec. Cases, 632.)

INDIANA STATUTE.— INTERSTATE TELEGRAMS.

The Indiana statute regulating telegraph companies is, so far as interstate messages are concerned, in conflict with the clause of the Federal Constitution which vests in Congress the power to regulate interstate commerce.

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Therefore, the penalty imposed by it cannot be recovered for failure to deliver a telegram addressed to a point without the State.

Cases of this series cited in opinion: *Tel. Co. v. Texas*, vol. 1, p. 373 ; *Pensacola Tel. Co. v. W. U. Tel. Co.*, vol. 1, p. 250.

THE facts and history of the case appear in the following statement, made by Mr. Justice Field:

The statute of Indiana declared that :

“ Every electric telegraph company, with a line of wires wholly or partly in this State, and engaged in telegraphing for the public, shall, during the usual office hours, receive dispatches, whether from other telegraphing lines or from individuals ; and on payment or tender of the usual charge, according to the regulations of such company, shall transmit the same with impartiality and good faith, and in the order of time in which they are received, under penalty, in case of failure to transmit, or if postponed out of such order, of one hundred dollars, to be recovered by the person whose dispatch is neglected or postponed : *Provided, however*, that arrangements may be made with the publishers of newspapers for the transmission of intelligence of general and public interest out of its order, and that communications for and from officers of justice shall take precedence of all others. (§ 4176, Rev. Stat. Ind. 1881.)

And that:

“ Such companies shall deliver all despatches, by a messenger, to the persons to whom the same are addressed, or to their agents, on payment of any charges due for the same: *Provided*, such persons or agents reside within one mile of the telegraphic station or within the city or town in which such station is.” § 4173, *Ibid*.

The present action was brought by William Pendleton, the plaintiff below, to recover of the Western Union Telegraph Company the penalty of one hundred dollars prescribed by the above statute, for failing to deliver at Ottumwa, in Iowa, a message received by it in Indiana for transmission to that place. The complaint, as finally amended, alleged that the defendant below, the Western Union Telegraph Company, was a corporation organized and subsisting under the laws of Indiana, with a line of wires from Shelbyville, in that State, to Ottumwa, in Iowa ; that on the 14th of April, 1883, at thirty-five minutes past

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five o'clock in the afternoon, at which time the company was engaged in telegraphing for the public, the plaintiff delivered to its agent at its office in Shelbyville, the following telegram for transmission to its office in Ottumwa, viz. :

“ April 14th, 1883.

“ To Rosa Pendleton, care James Harker,
near City Graveyard, Ottumwa, Iowa.

“ Have you shipped things? If not, don't ship. Answer quick.

WM. PENDLETON.”

That upon its delivery, the plaintiff paid the agent sixty cents, being the amount of the charge required for its transmission from Shelbyville to Ottumwa; that, without any fault or interference on his part, the company, after transmitting the message to Ottumwa, where it was received at half-past seven in the afternoon of that day, failed to deliver it either to Rosa Pendleton or to James Harker, whereby the plaintiff sustained damage and the defendant became liable for \$100, under the statute of Indiana; for which sum plaintiff demanded judgment.

To this complaint the company answered, admitting the receipt of the telegram as alleged, and setting up that it transmitted the message with impartiality and good faith, in the order of time in which it was received, and without delay, to its office in Ottumwa, Iowa, where it was received, as alleged, at half-past seven of that day; that James Harker, to whose care the message was directed, lived more than one mile from the telegraph station at Ottumwa; that, in accordance with the usual custom of the office, the message was, without delay, placed in the post-office of that town, with proper stamp thereon, and duly addressed; and that the telegram was received by the person to whom it was addressed on the following morning, April 15, 1883, at about nine o'clock.

The answer further set forth that the duties and liabilities of telegraph companies in Iowa, and the transmission and delivery of the telegrams within the State, were regu-

lated by a special statute of that State, which was as follows, viz. :

“ Any person employed in transmitting messages by telegraph must do so without unreasonable delay, and any one who wilfully fails thus to transmit them, or who intentionally transmits a message erroneously, or makes known the contents of any message sent or received to any person except him to whom it is addressed, or to his agent or attorney, is guilty of a misdemeanor. The proprietor of a telegraph is liable for all mistakes in transmitting messages made by any person in his employment, and for all damages resulting from a failure to perform any other duties required by law.”

That by that statute the defendant was not required to deliver telegrams by messenger to the persons to whom they were addressed ; that in the city of Ottumwa it had established a certain district within which it delivered telegrams by messenger ; and that on the receipt of the telegram in question at Ottumwa it was ascertained that Harker, to whose care it was addressed, did not reside within the delivery district, but outside of it, and more than one mile from the defendant's office, and that, in accordance with the custom and usage of the office, and in order to facilitate the delivery of the message, a copy of the telegram was promptly placed in the post-office at Ottumwa, with proper address, and delivered as stated above.

To this answer the plaintiff demurred ; the Circuit Court of the State sustained the demurrer ; and, the defendant electing to stand upon its answer, judgment was rendered for the plaintiff for \$100, which, on appeal to the Supreme Court of the State, was affirmed ; and the company brought the case here for review.

Augustus L. Mason, Joseph E. McDonald and John M. Butler, for plaintiff in error.

No appearance for defendant in error.

Mr. Justice FIELD delivered the opinion of the court.

The contention of the Western Union Telegraph Company is that the law of Indiana is in conflict with the clause

of the Constitution vesting in Congress the power to regulate commerce among the States.

In *Telegraph Co. v. Texas*, 105 U. S. 460, 464, it was decided by this court that intercourse by the telegraph between the States is interstate commerce. Its language was: "A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits."

Although intercourse by telegraphic messages between the States is thus held to be interstate commerce, it differs in material particulars from that portion of commerce with foreign countries and between the states which consists in the carriage of persons and the transportation and exchange of commodities, upon which we have been so often called to pass. It differs not only in the subjects which it transmits, but in the means of transmission. Other commerce deals only with persons, or with visible and tangible things. But the telegraph transports nothing visible and tangible; it carries only ideas, wishes, orders, and intelligence. Other commerce requires the constant attention and supervision of the carrier for the safety of the persons and property carried. The message of the telegraph passes at once beyond the control of the sender, and reaches the office to which it is sent instantaneously. It is plain, from these essentially different characteristics, that the regulations suitable for one of these kinds of commerce would be entirely inapplicable to the other.

In the consideration of numerous cases, in which questions have arisen relating to ordinary commerce with foreign countries and between the States, this court has reached certain conclusions as to what subjects of commerce the regulation of Congress is exclusive, and indicated on what subject the States may exercise a concurrent authority until

Telegraph Co. v. Pendleton.

Congress intervenes and assumes control. *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How. 299; *Gilman v. Philadelphia*, 3 Wall. 713; *Crandall v. Nevada*, 6 Wall. 35; *Welton v. State of Missouri*, 91 U. S. 275; *Henderson v. Mayor of New York*, 92 U. S. 259; *Inman Steamship Co. v. Tinker*, 94 U. S. 238; *Hall v. De Cuir*, 95 U. S. 485; *County of Mobile v. Kimball*, 102 U. S. 691; *Transportation Co. v. Parkersburgh*, 107 U. S. 691; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Wabash, St. Louis & Pacific Railway Co. v. Illinois*, 118 U. S. 557; and *Robbins v. Shelby Taxing District*, 120 U. S. 489, 493. But with reference to the new species of commerce, consisting of intercourse by telegraphic messages, this court has only in two cases been called upon to inquire into the power of Congress and of the State over the subject. In *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, this court had before it the act of Congress of July 24, 1866, 14 Stat. 221, "to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," and it held that the act was constitutional so far as it declared that the erection of telegraph wires should, as against State interference, be free to all who accepted its terms and conditions, and that a telegraph company of one State accepting them could not be excluded by another State from prosecuting its business within her jurisdiction. In *Telegraph Company v. Texas*, 105 U. S. 460, from the opinion in which we have quoted above, it was held that a statute of Texas imposing a tax upon every message transmitted by a telegraph company doing business within its limits, so far as it operated on messages sent out of the State, was a regulation of foreign and interstate commerce, and, therefore, beyond the power of the State.

In these cases the supreme authority of Congress over the subject of commerce by the telegraph with foreign countries or among the States is affirmed, whenever that body chooses to exert its power; and it is also held that the States can impose no impediments to the freedom of that

commerce. In conformity with these views, the attempted regulation by Indiana of the mode in which messages sent by telegraphic companies doing business within her limits shall be delivered in other States, cannot be upheld. It is an impediment to the freedom of that form of interstate commerce, which is as much beyond the power of Indiana to interpose as the imposition of a tax by the State of Texas upon every message transmitted by a telegraph company within her limits to other States was beyond her power. Whatever authority the State may possess over the transmission and delivery of messages by telegraph companies within her limits, it does not extend to the delivery of messages in other States.

The object of vesting the power to regulate commerce in Congress was to secure, with reference to its subjects, uniform regulations, where such uniformity is practicable, against conflicting State legislation. Such conflicting legislation would inevitably follow with reference to telegraphic communications between the citizens of different States, if each State was vested with power to control them beyond its own limits. The manner and order of the delivery of telegrams, as well as of their transmission, would vary according to the judgment of each State. Indiana, as seen by the law given above, has provided that communications for or from officers of justice shall take precedence, and that arrangements may be made with publishers of newspapers for the transmission of intelligence of general and public interest out of its order; but that all other messages shall be transmitted in the order in which they are received; and punishes as an offence a disregard of this rule. Her attempt, by penal statutes, to enforce a delivery of such messages in other States, in conformity with this rule, could hardly fail to lead to collision with the statutes. Other States might well direct that telegrams on many other subjects should have precedence in delivery within their limits over some of these, such as telegrams for the attendance of physicians and surgeons in case of sudden sickness or accident, telegrams calling for aid in cases of

fire or other calamity, and telegrams respecting sickness or death of relatives.

Indiana also requires telegrams to be delivered by messengers to the persons to whom they are addressed, if they reside within one mile of the telegraph station, or within the city and town in which such station is ; and the requirement applies, according to the decision of the Supreme Court in this case, when the delivery is to be made in another State. Other States might conclude that the delivery by messenger to a person living in a town or city being many miles in extent was an unwise burden, and require the duty within less limits ; but if the law of one State can prescribe the order and manner of delivery in another State, the receiver of the message would often find himself incurring a penalty because of conflicting laws, both of which he could not obey. Conflict and confusion could only follow the attempted exercise of such a power. We are clear that it does not exist in any State.

The Supreme Court of Indiana placed its decision in support of the statutes principally upon the ground that it was the exercise of the police power of the State. Undoubtedly, under the reserve powers of the State, which are designated under that somewhat ambiguous term of police powers, regulations may be prescribed by the State for the good order, peace, and protection of the community. The subjects upon which the State may act are almost infinite, yet in its regulations with respect to all of them there is this necessary limitation, that the State does not thereby encroach upon the free exercise of the power vested in Congress by the Constitution. Within that limitation it may, undoubtedly, make all necessary provisions with respect to the buildings, poles, and wires of telegraph companies in its jurisdiction which the comfort and convenience of the community may require.

It follows from the views expressed that

The judgment of the court below must be reversed, and

the cause remanded for further proceedings not inconsistent with this opinion; and it is so ordered.

NOTE.— This case is cited in *Leloup v. Port of Mobile*, *post*.
See note to *W. U. Tel. Co. v. Commonwealth*, *post*.
See INDEX to vol. 1, title "Interstate Commerce."

WESTERN UNION TELEGRAPH COMPANY v. THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

U. S. Supreme Court, March 19, 1888.

(125 U. S. 530.)

TAXATION.— POST-ROADS ACT.— INTERSTATE COMMERCE.— INJUNCTION.— MASSACHUSETTS STATUTE.

A telegraph company does not, by virtue of its acceptance of the provisions of the "Post-roads Act" of Congress (U. S. R. S. §§ 5263-9), become entitled to exemption from State taxation as to so much of its line as is situate upon and along post-roads.

A State tax which, though nominally upon the shares of the capital stock of a telegraph company, is in effect a tax upon its property within the State, the value of such property being based upon the proportion of the length of its lines in the State, to their length throughout the entire country, is forbidden neither by acceptance by the company of the provisions of the "Post-roads Act," nor by the interstate commerce clause of the Constitution of the United States.

While a State may legally levy and collect such a tax, it cannot enforce collection by injunction, restraining all operations of the company within the State until the tax is paid.

And § 54 of chapter, 13 Mass. Pub. Stat. is void so far as it authorizes such injunction.

Case of this series cited in opinion : *Tel. Co. v. Texas*, vol. 1, p. 373.

APPEAL from a judgment of the Circuit Court of the United States for the district of Massachusetts, for a State tax upon the capital stock of the Western Union Telegraph Company, defendant below, and enjoining the company

from operating within that State until the tax should be paid. The facts sufficiently appear in the opinion.

George S. Hale (with whom were *Charles W. Wells* and *Willard Brown* on the brief), for plaintiff in error.

Andrew J. Waterman, attorney-general of the Commonwealth of Massachusetts, and *Henry C. Bliss*, assistant attorney-general of that State, for defendant in error.

Mr. Justice MILLER delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the district of Massachusetts.

The action was commenced in the Supreme Judicial Court of Massachusetts, sitting in equity, by an information on behalf of the Commonwealth, by its attorney-general, at the relation of the treasurer thereof, Alanson W. Beard.

It was afterwards removed, upon motion of the defendant, the Western Union Telegraph Company, into the Circuit Court of the United States. The object of the information was to enforce the collection of a tax levied by the proper authorities of the State upon the telegraph company, and to enjoin it from the further operation of its telegraph lines within the territorial limits of the Commonwealth until that tax was paid.

The defendant company is a corporation organized under the laws of the State of New York, having its capital stock divided into shares. The tax assessed by the treasurer of the Commonwealth of Massachusetts was based upon an estimate of \$750,952 as the taxable value of the shares of the corporation apportioned to that State, the rate of taxation having been determined for that year, 1885, at \$14.14 for and upon each \$1,000 of valuation. The mode by which this taxable valuation was arrived at was this: The treasurer ascertained from the officers of the telegraph company that the valuation of its entire capital stock was \$47,500,000, from which were deducted the credit proper to be allowed in determining the assessable value, leaving \$38,713,-

924 as the total valuation of said stock liable to taxation. It was then ascertained that the total number of miles of line of said corporation in all the States and Territories of this country was 146,052.60, of which 143,219.55 were without the limits of the Commonwealth of Massachusetts, leaving 2,833.05 miles within its boundaries. Taking these figures, the treasurer of the State assessed the value of that portion of the capital stock of this company which, under this calculation, would fall within the Commonwealth of Massachusetts, at the sum of \$750,952. The amount thus arrived at, at the rate of \$14.14 upon each \$1,000 of valuation, produced the sum of \$10,618.46 as the amount of the tax claimed to be due and payable to the treasurer of said Commonwealth by that corporation. This sum was demanded of the telegraph company, but it refused to pay the same.

The answer of the defendant corporation set up that of its 2,833.05 miles of line within the State of Massachusetts more than 2,334.55 miles were over, under or across post-roads, made such by the United States, leaving only 498.50 miles not over or along such post-roads, on which the company offered to pay the proportion of the tax assessed, according to mileage, by the State authorities.

The main ground on which the telegraph company resisted the payment of the tax alleged to be due, and on which probably the case was removed from the State court into the Circuit Court of the United States, is that it is a violation of the rights conferred on the company by the act of July 24, 1866, now title LXV, §§ 5263 to 5269 of the Revised Statutes. The defendant alleges that it had accepted the provisions of that law, and filed a notification of such acceptance with the Postmaster-General of the United States June 8, 1867. The argument is, therefore, that by virtue of § 5263 the company has a right to exercise its functions of telegraphing over so much of its lines as is connected with the military and post-roads of the United States, which have been declared to be such by law, without

being subject to taxation therefor by the State authorities. That section reads as follows:

“Sec. 5268. Any telegraph company now organized, or which may hereafter be organized under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by law, and over, under or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads.”

It is urged that this section, upon its acceptance by this corporation or any of like character, confers a right to do the business of telegraphing which is transacted over the lines so constructed over or along such post-roads, without liability to taxation by the State. The argument is very much pressed that it is a tax upon the franchise of the company, which franchise, being derived from the United States by virtue of the statute above recited, cannot be taxed by a State, and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation. The laws of that Commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein.

The telegraph company, which is the defendant here, derived its franchise to be a corporation and to exercise the function of telegraphing from the State of New York. It owes its existence, its capacity to contract, its right to sue and be sued, and to exercise the business of telegraphy, to the laws of the State under which it is organized. But the

privilege of running the lines of its wires "through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, * * * and over, under or across the navigable streams or waters of the United States," is granted to it by the act of Congress. This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the Federal Government, carries with it any exemption from the ordinary burdens of taxation.

While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support.

In the case of *Telegraph Company v. Texas*, 105 U. S. 460, this question was very fully considered, and while a tax imposed upon every telegram passing over its lines, whether entirely within the State or coming from without its limits, or going from the State out of it, was held to be void so far as related to messages passing through more than one State, as an interference with or a regulation of commerce and with the act of Congress we have just been considering, it was distinctly pointed out that if it could be ascertained what telegrams were confined wholly within the State, a tax on those might be imposed by it.

In that case the Chief Justice, delivering the opinion of the court, said :

“The Western Union Telegraph Company, having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the State, or sent by public officers on the business of the United States” (pages 464, 465).

This authority of the government gives to this telegraph company, as well as to all others of a similar character who accept its provisions, the right to run their lines over the roads and bridges which have been declared to be post-roads of the United States. If the principle now contended for be sound, every railroad in the country should be exempt from taxation because they have all been declared to be post-roads ; and the same reasoning would apply with equal force to every bridge and navigable stream throughout the land. And if they were not exempt from the burden of taxation simply because they were post-roads, they would be so relieved whenever a telegraph company chose to make use of one of these roads or bridges along or over which to run its lines. It was to provide against the recognition of such a principle that this court, in the case above cited, while holding that telegrams themselves coming from without a State or sent out of it as a part of their conveyance could not be taxed by the State specifically, nevertheless used the language that “its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business.”

A still stronger case in the same direction is that of *Rail-*

road Company v. Peniston, 18 Wall. 5. The plaintiff in that action, the Union Pacific Railroad Company, was incorporated under a law of the United States. The State of Nebraska, under a revenue law passed by its Legislature, undertook to lay a tax upon the property of that company which was used or embraced within the limits of its territory, upon a valuation of \$16,000 per mile. The property thus rated and taxed consisted of its road-bed, depots, stations, telegraph poles, wires, bridges, etc. It will be here observed that a part of the valuation on which this tax was levied was made up of the telegraph poles and wires belonging to the company.

The argument was pressed in that case that the railroad company held its franchises from the government of the United States, and that its property could not be taxed by the State, but this court held otherwise, and in the opinion used this language :

“It is often a difficult question whether a tax imposed by a State does in fact invade the dominion of the general government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The States are, and they must ever be, co-existent with the national government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise ” (pp. 30, 31).

The case of *Thomson v. Pacific Railroad Co.*, 9 Wall. 579, is then cited, where it was held that the property of that company was not exempt from State taxation, though

their railroad was a part of a system of roads constructed under the authority and direction of the United States, and largely for the uses and to serve the purposes of the general government. The court further said :

“A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops and munitions of war are carried upon almost every railroad. *Telegraph lines* are employed in the national service. So are steamboats, horses, stage-coaches, foundries, shipyards, and multitudes of manufacturing establishments. They are the property of natural persons or of corporations, who are agents or instruments of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States, it is manifest the State governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the United States in the general government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that State taxation of such property is impliedly prohibited” (p. 33).

In *National Bank v. Commonwealth*, 9 Wall. 353, which was a case of a tax levied upon the shares of a national bank, the same objection in regard to a tax by State authority was pressed upon the court, but this court said that the principle of exemption of Federal agencies from State taxation has a limitation growing out of the necessity upon which the principle is founded. “That limitation is, that the agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of

the United States the means of exercising its legitimate powers into an unauthorized and unjustifiable invasion of the rights of the States. * * * So of the banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. We do not see the remotest probability of this, in their being required to pay the tax which their stockholders owe to the State for the shares of their capital stock, when the law of the Federal government authorizes the tax'' (p. 362).

The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts, and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by § 5263 of the Revised Statutes, or by the commerce clause of the Constitution.

It is urged against this tax, that in ascertaining the value of the stock no deduction is made on account of the value of real estate and machinery situated and subject to local taxation outside of the Commonwealth of Massachusetts. The report of Examiner Fiske, to whom the matter was referred to find the facts, states that the amount of the value of said real estate outside of its jurisdiction was not clearly shown, but it did appear that the cost of land and buildings belonging to the company and entirely without that State was over three millions of dollars. In the statement of the treasurer of the company it is said that the value of real

estate owned by the company within the State of Massachusetts was nothing. Since the corporation was only taxed for that proportion of its shares of capital stock which was supposed to be taxable in that State on the calculation above referred to, and since no real estate of the corporation was owned or taxed within its limits, we do not see why any deduction should be made from the proportion of the capital stock which is taxed by its authorities. But if this were otherwise, we do not feel called upon to defend all the items and rules by which they arrived at the taxable value on which its ratio of percentage of taxation should be assessed; and even in this case, which comes from the Circuit Court and not from that of the State, we think it should appear that the corporation is injured by some principle or rule of law not equally applicable to other objects of taxation of like character. Since, therefore, this statute of Massachusetts is intended to govern the taxation of all corporations therein, and doing business within its territory, whether organized under its own laws or those of some other State, and since the principle is one which we cannot pronounce to be an unfair or an unjust one, we do not feel called upon to hold the tax void, because we might have adopted a different system had we been called upon to accomplish the same result.

It is very clear to us, when we consider the limited territorial extent of Massachusetts, and the proportion of the length of the lines of this company in that State to its business done therein, with its great population and business activity, that the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not unfavorable to the corporation, and the details of the method by which this was determined have not exceeded the fair range of legislative discretion. We do not think that it follows necessarily, or as a fair argument from the facts stated in the case, that there was injustice in the assessment for taxation.

The result of these views is, that the tax assessed against

the plaintiff in error is a valid tax ; that the judgment of the court below, "that the sum claimed by the plaintiff (below) to be due for taxes, to wit, \$10,618.46, be paid to said State by said corporation, with interest thereon," is without error, and so much of said judgment is hereby affirmed.

The degree or judgment, however, proceeds and awards an injunction against the company in the following language, added to that above extracted : "And that an injunction shall be issued out of and under the seal of this court, directed to said corporation, and its officers, agents and servants, commanding them and each of them absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums due to the said Commonwealth for taxes as aforesaid shall have been fully paid, with interest and costs, unless the said sum is paid by said defendant within thirty days from the entry hereof."

The effect of this injunction, if obeyed, is to utterly suspend the business of the telegraph company, and defeat all its operations within the State of Massachusetts. The act of Congress says that the company accepting its provisions "shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States." It is found in this case that 2,334.55 miles of the company's lines, out of 2,833.05 on which this tax is assessed, are along and over such post-roads, and of course the injunction prohibits the operation of the defendant's telegraph over these lines, nearly all it has in the State.

If the Congress of the United States had authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done. The injunction in this case, though ordered by a Circuit Court of the United States, is only granted by virtue of section 54 of chapter 13 of the Public Statutes of Massachu-

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setts. If this statute is void, as we think it is, so far as it prescribes this injunction as a remedy to enforce the collection of its taxes by the decree of the court awarding it, the injunction is erroneous.

In holding this portion of section 54 of chapter 13 of the Massachusetts statutes to be void as applicable to this case, we do not deprive the State of the power to assess and collect the tax. If a resort to a judicial proceeding to collect it is deemed expedient, there remain to the court all the ordinary means of enforcing its judgment-executions, sequestration, and any other appropriate remedy in chancery.

That part of the decree of the Circuit Court which awards the injunction is, therefore, reversed, and the case is remanded to that court for further proceedings in conformity to this opinion.

Mr. Justice BRADLEY was not present at the argument of this case and took no part in its decision.

NOTE.—This case is cited in the following cases, *post*: *Ratterman v. W. U. Tel. Co.*; *Leloup v. Port of Mobile*.

See note to *W. U. Tel. Co. v. Commonwealth*, *post*.

See INDEX to vol. 1, titles mentioned at head of syllabus, above.

FRANK RATTERMAN, Treasurer of Hamilton County, Ohio,
Applt., v. WESTERN UNION TELEGRAPH COMPANY.

WESTERN UNION TELEGRAPH COMPANY, Applt., v. FRANK
RATTERMAN, Treasurer of Hamilton County, Ohio.

U. S. Supreme Court, May 14, 1888.

(127 U. S. 411.)

CONSTITUTIONAL LAW.—INTERSTATE COMMERCE.—TAXATION.

A single tax, assessed under a State statute, upon the receipts of a telegraph company which were derived partly from interstate commerce

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and partly from commerce within the State, but which were returned and assessed in gross and without separation or apportionment, is not wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce.

Cases in this series cited in opinion : *Pensacola Tel. Co. v. W. U. Tel. Co.*, vol. 1, p. 250 ; *Telegraph Co. v. Texas*, vol. 1, p. 373 ; *W. U. Tel. Co. v. Massachusetts, ante*, p. 57.

APPEALS from the Circuit Court of the United States for the Southern District of Ohio, W. D.

The case as stated by the court was as follows :

These are cross appeals from a decree of the Circuit Court for the Southern District of Ohio, Western Division.

The suit was begun by a bill of complaint, filed by the Western Union Telegraph Company against Frank Ratterman, treasurer of Hamilton county, in the State of Ohio. As the bill is not very long, it is here presented in full :

“To the judges of the Circuit Court of the United States for the Southern District of Ohio, Western Division :

“The Western Union Telegraph Company, a corporation duly organized and existing under the laws of the State of New York and a citizen of said State, brings this its bill against Frank Ratterman, treasurer of Hamilton county, Ohio, and a citizen of the State of Ohio.

“And thereupon your orator complains and says :

“That its principal office is, and during the times hereinafter mentioned was, in the city of New York ; that during said time it had been and now is engaged in the business of receiving and transmitting for hire telegraph messages between different points in the United States, and in the carrying on of said business has offices in the city of Cincinnati and at other points in the county of Hamilton and in the State of Ohio, and has been engaged in the transmission of messages between said offices and other points both within and without the State of Ohio.

“That prior to 1869 your orator accepted in writing the provisions of the act of Congress of July 4, 1866 (14 U. S. Stats. at L. 221) ; that your orator's wires, poles, batteries,

office furniture and other property in the State of Ohio have been and are taxed like other property in said State; that your orator's telegraph lines cross nearly all of the States of the Union and occupy portions of British America, and that a large amount of the commercial transactions, business and intercourse of the people is carried on by means of their wires.

“That in the month of May, 1887, your orator, under protest, delivered to the auditor of said county a statement, as required by Revised Statutes of Ohio, § 2778, showing the entire receipts of your orator in said county for the year next preceding, which said gross receipts amounted to the sum of \$175,210.88, and were principally for business between points in the State of Ohio and points outside the State of Ohio—that is to say, the receipts of your orator for messages and business pertaining to commerce between the States, and not for messages between different points within the State of Ohio; that thereupon said auditor assessed a tax thereon amounting to five thousand two hundred and six and 90-100 dollars.

“Your orator says that said tax is illegal and void and in violation of the Constitution of the United States.

“Your orator has offered to the defendant and is ready and willing to pay to him the taxes chargeable against its personal property within said county, but the defendant refuses to accept payment thereof unless your orator also at the same time pays said total assessment for all of said gross receipts; and, unless restrained, the defendant will impose and enforce the penalties for non-payment of said tax provided for by Revised Statutes of Ohio, § 2843, to the interference, stoppage and destruction of your orator's business.

“Wherefore, your orator prays that the defendant may be required to accept payment of so much of said tax assessment as covers the property of your orator in the said county, and that he may be enjoined by preliminary injunction and by final decree from levying or collecting the balance of said assessment.

“Your orator prays that a writ of subpoena may issue against the defendant, and that your orator may have such other and further relief as it is in equity and good conscience entitled to.”

To this bill a general demurrer was filed, which was overruled by the court. The record then proceeds as follows:

“And thereupon it was agreed by and between the complainant and defendant that the cause be submitted to the court on the bill without further pleading to the same by the defendant, upon the following facts:

“That of the entire receipts mentioned in the bill, \$142,154.18 were for business done by the plaintiff between its offices in said county and points outside of the State of Ohio—that is, for messages and business pertaining to commerce between the States and not for messages between different points within the State of Ohio—and that the balance of said receipts, to wit, \$33,056.70, was for business between the offices of the plaintiff in said county and other points within the State of Ohio; and that if said receipts had been so separated and apportioned, and said tax had been separately assessed on the basis of such separation and apportionment, the amount of said total tax of \$5,206.90 apportionable to said receipts for interstate commerce would be \$3,931.51, and the amount apportionable to said receipts for business between the offices of the complainant in said county and other points within the State of Ohio would have been \$910.40; and that the remainder of said sum of \$5,206.90, viz., \$364.99, was for tax assessed upon the personal property of the said complainant within the said county of Hamilton aforesaid, namely, upon its instruments, wires, poles, and other chattel property which were returned by said complainant to the auditor of said county at a valuation of \$18,059.

“That Exhibit ‘A,’ hereto annexed and made a part of this stipulation, is a copy of the return made by complainant to the auditor of said county in pursuance of the law of the State of Ohio, and that said complainant made no other return and furnished no other information to said auditor

at the time of said return, save what is contained in said return.

“That Exhibit ‘B,’ hereto annexed and made a part hereof, is a copy of the return of the chattel property of said complainant made at the same time to said auditor.

“It is further agreed that the auditor of said county placed on the tax duplicate of said county said sums of \$175,210.88 and \$18,059 as the personal property of said complainant, to be assessed for taxation in said county of Hamilton, and that the rate of taxation assessed thereupon was the same as was assessed against the personal property listed for taxation by the citizens of said county.

“It is further agreed that complainant, prior to December 20, 1887, offered to pay the tax properly assessable against said return of \$18,059 for personal property, but the defendant refused to accept payment of said assessment of \$5,200.00 unless the whole were paid. The plaintiff did not disclose to said auditor at the time it made said return what portion, if any, of the gross receipts of its said offices in said county was for interstate commerce.

“It is further agreed that neither said auditor nor said treasurer had any actual knowledge that any portion of the returns of said gross receipts was for the interstate commerce business, and said officers knew that plaintiff’s said business included interstate commerce.

“And the only knowledge said auditor and said treasurer had of the business of said company and what said receipts were derived from was from the returns hereto annexed, marked Exhibit ‘A,’ and from their knowledge as aforesaid of the plaintiff’s business.

“The cause being thus submitted to the court on the foregoing stipulation of facts and the argument of counsel, the court is of the opinion that said receipts and tax may be separated and apportioned, and that said tax, so far as so separated and apportioned to said receipts derived from the interstate commerce, is unconstitutional and void, but valid apportionable to said receipts derived from State business.

“It is thereupon ordered by the court, adjudged and decreed, that the defendant is hereby forever enjoined from collecting on said assessment of \$5,206.90 more than the sum of \$1,275.39, and an injunction is refused as to the balance of said tax. It is further ordered that the defendant pay the costs of this suit.”

The judges of the Circuit Court, upon this state of facts, made the following certificate of a difference of opinion :

“This is to certify that at the hearing of the above entitled cause before Hon. HOWELL E. JACKSON, circuit judge, and GEORGE R. SAGE, district judge, said judges differed in opinion upon the following questions of law, to wit :

“Whether a single tax, assessed under the Revised Statutes of Ohio, section 2778, upon the receipts of a telegraph company, which receipts were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross and without separation or apportionment, is wholly invalid, or invalid only in the proportion and to the extent that said receipts were derived from interstate commerce.

“And the district judge being of the opinion that such a tax is wholly invalid, and the circuit judge being of the opinion that it is invalid only to the extent and in the proportion that the receipts upon which it is based were derived from interstate commerce, said question is hereby certified to the Supreme Court of the United States for its opinion.

“HOWELL E. JACKSON, Circuit Judge.

“GEORGE R. SAGE, District Judge.”

Lawrence Maxwell, Jr., for the Western Union Telegraph Company; *William M. Ramsay*, *William Brown* and *Charles W. Wells*, were with him on the brief.

Thomas McDougall and *David K. Watson*, Attorney-General of the State of Ohio, for Ratterman; *William A. Davidson*, county solicitor for Hamilton county, Ohio, was with them on the brief.

MILLER, J. : The case has been very fully argued before

at the time of said return, save what is contained in said return.

“That Exhibit ‘B,’ hereto annexed and made a part hereof, is a copy of the return of the chattel property of said complainant made at the same time to said auditor.

“It is further agreed that the auditor of said county placed on the tax duplicate of said county said sums of \$175,210.88 and \$18,059 as the personal property of said complainant, to be assessed for taxation in said county of Hamilton, and that the rate of taxation assessed thereupon was the same as was assessed against the personal property listed for taxation by the citizens of said county.

“It is further agreed that complainant, prior to December 20, 1887, offered to pay the tax properly assessable against said return of \$18,059 for personal property, but the defendant refused to accept payment of said assessment of \$5,206.90 unless the whole were paid. The plaintiff did not disclose to said auditor at the time it made said return what portion, if any, of the gross receipts of its said offices in said county was for interstate commerce.

“It is further agreed that neither said auditor nor said treasurer had any actual knowledge that any portion of the returns of said gross receipts was for the interstate commerce business, and said officers knew that plaintiff’s said business included interstate commerce.

“And the only knowledge said auditor and said treasurer had of the business of said company and what said receipts were derived from was from the returns hereto annexed, marked Exhibit ‘A,’ and from their knowledge as aforesaid of the plaintiff’s business.

“The cause being thus submitted to the court on the foregoing stipulation of facts and the argument of counsel, the court is of the opinion that said receipts and tax may be separated and apportioned, and that said tax, so far as so separated and apportioned to said receipts derived from the interstate commerce, is unconstitutional and void, but valid apportionable to said receipts derived from State business.

“It is thereupon ordered by the court, adjudged and decreed, that the defendant is hereby forever enjoined from collecting on said assessment of \$5,206.90 more than the sum of \$1,275.39, and an injunction is refused as to the balance of said tax. It is further ordered that the defendant pay the costs of this suit.”

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“Whether a single tax, assessed under the Revised Statutes of Ohio, section 2778, upon the receipts of a telegraph company, which receipts were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross and without separation or apportionment, is wholly invalid, or invalid only in the proportion and to the extent that said receipts were derived from interstate commerce.

“And the district judge being of the opinion that such a tax is wholly invalid, and the circuit judge being of the opinion that it is invalid only to the extent and in the proportion that the receipts upon which it is based were derived from interstate commerce, said question is hereby certified to the Supreme Court of the United States for its opinion.

“HOWELL E. JACKSON, Circuit Judge.

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MILLER, J.: The case has been very fully argued before

us upon all the matters properly presented by the record, and it seems probable from the amicable nature of the proceedings and the agreement as to a statement of facts upon which the case was to be tried, without answer being filed to the bill, that the purpose was to obtain the judgment of this court upon the general subject of the liability of the corporation to taxation upon the amount of its receipts, and that the certificate of a difference of opinion has been used for that purpose.

With regard to the question which is certified to us as dividing the opinions of the judges of the Circuit Court, we do not think that there is any difficulty, and can hardly see how it arose in the present case. That question is "whether a single tax, assessed under the Revised Statutes of Ohio, section 2778, upon the receipts of a telegraph company, which receipts were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross and without separation or apportionment, is wholly invalid, or invalid only in the proportion and to the extent that said receipts were derived from interstate commerce."

We do not think this particular question is material in this case, because the state of facts agreed upon by the parties makes this separation, and presents the matter to the court freed from the point raised by the question that the tax was not separable. Nor do we believe, if there were allegations either in the bill or answer setting up that part of the tax was from interstate commerce and part from commerce wholly within the State, that there would have been any difficulty in securing the evidence of the amount of receipts chargeable to these separate classes of telegrams, by means of the appointment of a referee or master to inquire into that fact and make report to the court. Neither are we of opinion that there is any real question, under the decisions of this court, in regard to holding that so far as this tax was levied upon receipts properly appurtenant to interstate commerce it was void, and that so far as it was only upon commerce wholly within the State it was valid.

This precise question was adjudged in the case of the *State Freight Tax*, 15 Wall. 232. That was a case in which a statute of the State of Pennsylvania was examined which provided for a tax upon every ton of freight transported by any railroad or canal in that State, at certain rates—two cents for one class of freight, three cents for another, and five cents for still another class. The payment of this tax was resisted by the Reading Railroad Company upon the ground that it was levied on interstate commerce. The company made returns to the accounting officers of the Commonwealth, in which they stated separately the amount of freight whose transportation was wholly within the State, and also the amount of the transportation of freight brought into or carried out of that State. This court held that the tax upon the former class, being upon commerce wholly within the State, was valid under the law of Pennsylvania by which it was imposed, but that the latter classes, being commerce among the States, were not subject to such taxation.

This ruling shows that where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the court will act upon this distinction, and will restrain the tax on interstate commerce while permitting the State to collect that arising upon commerce solely within its own territory.

In *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U. S. 1, it was decided by this court that the telegraph was an instrument of commerce; that telegraph companies were subject to the regulating power of Congress in respect to their foreign and interstate business, and that such a company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods.

In *Telegraph Company v. Texas*, 105 U. S. 460, the same question presented in this case was before the court—that of the power of the State to tax telegraphic messages received and delivered by the same corporation—which is

now before us. In that case no distinction was made by the statute between what we now call interstate messages and those exclusively within the State. . This court, therefore, in reviewing the decision of the Supreme Court of the State of Texas, which had allowed no deduction for taxes on messages sent out of the State, or by government officers on government business, said: "It follows that the judgment, so far as it includes the tax on messages sent out of the State, or for the government on public business, is erroneous. The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of a State, and does not affect other nations or States or the Indian tribes, that is to say, the purely internal commerce of a State, belongs exclusively to the State, is as well settled as that the regulation of commerce which does affect other nations or States or the Indian tribes belongs to Congress. Any tax, therefore, which the State may put on messages sent by private parties, and not by the agents of the government of the United States, from one place to another, exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States. Whether the law in Texas, in its present form, can be used to enforce the collection of such a tax is a question entirely within the jurisdiction of the courts of the State, and as to which we have no power of review."

The court reversed the judgment of the Supreme Court of Texas, and remanded the cases with instructions for such further proceedings as justice might require. Evidently, the purpose of this was to permit the Supreme Court of that State, if it could separate the taxes upon the two classes of telegrams, to do so, and to render judgment accordingly.

In the recent case of the *Western Union Tel. Co. v. Attorney-General of the Commonwealth of Massachusetts*, 125 U. S. 530, decided at this term, a tax was levied upon that corporation, apportioned under the laws of Massachusetts, upon the taxable value of its capital stock. The ratio which should have been allotted to that Common-

wealth may be supposed to have been properly apportioned to it, ascertaining that portion by means of the length of the lines of the company in relation to the entire mileage of its lines in the United States. The payment of the tax was resisted, however, partly upon the ground that it was levied upon interstate commerce, but mainly because it was asserted to be a violation of the rights conferred on the company by the Act of July 24, 1866, now title LXV sections 5263 to 5269 of the Revised Statutes. It was alleged that the defendant company, having accepted the provisions of that law, was entirely exempt from taxation by the State. This court, however, held that this exemption only extended under that law to so much of the lines of the telegraph company as were, in the language of section 5263, "through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by law, and over, under or across the navigable streams or waters of the United States."

It was shown in that case that, of the 2,833.05 miles of the lines of the defendant corporation within the boundaries of Massachusetts, more than 2,334.55 miles came within the terms of that section, being over or along post-roads, made such by the United States, or over, under or across its navigable streams or waters, leaving only 498.50 miles not within such description, on which the company offered to pay the proportion of the tax assessed against it according to mileage by the State authorities.

We refer to this now only for the purpose of showing how easily the subject of taxation which is forbidden by the Constitution may be separated from that which is permissible in this class of cases. The court held in that case that this tax, being in effect levied upon the capital stock or property of the company in the State of Massachusetts, which was ascertained upon the basis of the proportion which the length of its lines in that State bore to their entire length throughout the whole country, and not upon its messages or upon the receipts for such messages, was

a valid tax. The question of interstate commerce, as affecting the tax in that action, was very little pressed by counsel for the company, but they relied upon the privilege granted by section 5263, already cited, to companies which accepted its provisions, and upon the fact that a large proportion of the lines of the defendant telegraph company were over or along post-roads, or over, under or across the navigable streams or waters of the United States.

In the present case counsel for the telegraph company have argued that this statute secures the corporation from taxation of any kind whatever, and especially as to receipts arising from messages sent over its lines ; but that question does not arise in this action, because there is no allegation or averment, either in the bill itself or in the statement of facts, that any part of the lines of the telegraph company in the State of Ohio is built over or along a post-road, or comes within the provisions of section 5263. The only reference to this subject is in the following allegations of the bill: "That prior to 1869 your orator accepted in writing the provisions of the act of Congress of July 4, 1866, 14 Stat. 221." Under this allegation the complainant can, of course, claim no benefit from the provisions of that section, for it does not appear that any part of the company's line comes within the description of this section of the Revised Statutes.

Under these views, we answer the question, in regard to which the judges of the Circuit Court divided in opinion, by saying that a single tax, assessed under the Revised Statutes of Ohio, upon the receipts of a telegraph company which are derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross and without separation or apportionment, is *not* wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce. Concurring, therefore, with the circuit judge in his action, enjoining the collection of the taxes on that portion of the receipts derived from interstate commerce, and permitting the treasurer to collect the

Edward Leloup v. Port of Mobile.

other tax upon property of the company and upon receipts derived from commerce entirely within the limits of the State, this decree is *affirmed*.

NOTE.—This case is cited in the following cases, *post*: *W. U. Tel. Co. v. Commonwealth*; *Leloup v. Port of Mobile*.

See note to *W. U. Tel. Co. v. Commonwealth*, *post*.

EDWARD LELOUP v. PORT OF MOBILE.

U. S. Supreme Court, May 14, 1888.

(127 U. S. 640.)

CONSTITUTIONAL LAW.—INTERSTATE COMMERCE.—TAXATION.

“No State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on; and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.”

Accordingly held that an ordinance of the Port of Mobile, a municipal corporation, adopted pursuant to its charter, imposing a license tax on telegraph companies and a fine for its violation, was unconstitutional and void.

Cases in this series cited in opinion: *Pensacola Tel. Co. v. W. U. Tel. Co.*, vol. 1, p. 250; *Telegraph Co. v. Texas*, vol. 1, p. 378; *W. U. Tel. Co., v. Pendleton*, *ante*, p. 50; *Ratterman v. W. U. Tel. Co.*, *ante*, p. 68; *W. U. Tel. Co. v. Massachusetts*, *ante*, p. 57.

ERROR to the Supreme Court of Alabama. The facts and points at issue are stated in the opinion.

Gaylord B. Clark, for plaintiff in error.

No appearance for defendant in error.

Mr. Justice BRADLEY delivered the opinion of the court: This was an action brought in the Mobile Circuit Court,

in the State of Alabama, by the Port of Mobile, a municipal corporation, against Edward Leloup, agent of the Western Union Telegraph Company, to recover a penalty imposed upon him for the violation of an ordinance of said corporation, adopted in pursuance of the powers given to it by the Legislature of Alabama, and in force in August, 1883. The ordinance was as follows, to wit:

“Be it ordained by the Mobile Police Board, that the license tax for the year, from the 15th of March, 1883, to the 15th of March, 1884, be, and the same is hereby, fixed as follows:

“On telegraph companies, \$225.

“Be it further ordained: For each and every violation of the aforesaid ordinance, the person convicted thereof shall be fined by the recorder not less than one nor more than fifty dollars.”

The complaint averred that the defendant, being the managing agent of the Western Union Telegraph Company, a corporation having its place of business in the said port of Mobile, and then and there engaged in the business and occupation of transmitting telegrams from and to points within the State of Alabama and between the private individuals of the State of Alabama, as well as between citizens of said State and citizens of other States, committed a breach of said ordinance by neglecting and refusing to pay said license to the said municipal corporation. The complainant further averred that for this breach the recorder of the port of Mobile imposed on the defendant a fine of five dollars, for which sum the suit was brought.

The defendant pleaded that at the time of the alleged breach of said ordinance he was the duly appointed manager, at the port of Mobile, of the Western Union Telegraph Company. That said company “was, prior to the fifth day of June, 1867, a telegraph company duly incorporated and organized under the laws of the State of New York, and by its charter authorized to construct, maintain and operate lines of telegraph in and between the various States of the Union, including the State of Alabama. That on said fifth day of June, 1867, the said telegraph company duly filed its written acceptance with Postmaster-General of the United

States of the restrictions and obligations of an act of Congress entitled 'An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military, and other purposes,' approved July 24, 1866. That in accordance with the authority of its said charter and the said act of Congress, and by agreement with the railroad companies, the said telegraph company constructed its lines and was, at the time of the said alleged breach of said ordinance, maintaining and operating said lines of telegraph on the various public railroads leading into or through the said port of Mobile, to wit, the Mobile and Ohio railroad, a railroad extending from the said port of Mobile, in Alabama, through the States of Mississippi, Tennessee and Kentucky, to Cairo, in the State of Illinois; the Louisville and Nashville railroad, extending from Cincinnati, in the State of Ohio, through said port of Mobile to New Orleans, in the State of Louisiana, with a branch extending from said State of Alabama over the Pensacola and Louisville railroad to Pensacola, in the State of Florida. That the said telegraph lines so running into or through said port of Mobile connected with and extended beyond the termini of the said railroads over other railroads, making continuous lines of telegraph from the office of said company, in said port of Mobile, to, through and over all the principal railroads, post-roads and military roads in and of the United States, and having offices for the transaction of telegraph business in the departments at Washington, in the District of Columbia, and in all the principal cities, towns and villages in each of the United States and in the territories thereof. That all of said railroads so leading into and through the said port of Mobile and elsewhere in the United States are public highways, and that the daily mails of the United States are regularly carried thereon, under authority of law and the direction of the Postmaster-General, and that said railroads and each of them are post-roads of the United States. That said telegraph lines are also constructed under and across the navigable streams of the United States, in the State of

Alabama and in the other States of the Union, but in all cases said lines are so constructed and maintained as not to obstruct the navigation of such streams and the ordinary travel on such military and post roads. That the said telegraph company was, before and during said year, commencing March 15, 1883, and now is, engaged in the business of sending and receiving telegrams over said lines for the public between its said office in the port of Mobile and other places in other States and territories of the United States, and to and from foreign countries; also in sending telegraphic communications between the several departments of the Government of the United States and their officers and agents, giving priority to said official telegraphic communications over all other business. And defendant avers that said official telegrams have been and are sent at rates which have been fixed by the Postmaster-General annually since the said 5th day of June, 1867. And defendant avers that as the manager of said company and in its name and under its direction and appointment, and in no other manner or capacity, was he engaged in said telegraph business at the time and in the manner as alleged in said complaint."

To this plea a demurrer was filed and sustained by the court, and judgment was given for the plaintiff; and, on appeal to the Supreme Court of Alabama, this judgment was affirmed. The present writ of error is brought to review the judgment of the Supreme Court. That court adopted its opinion given on a previous occasion between the same parties, in which the Circuit Court had decided in favor of the defendant, and its decision was reversed. In that opinion the Supreme Court said: "The defense was that the ordinance is an attempt to regulate commerce and violative of the clause of the Constitution of the United States which confers on Congress the 'power to regulate commerce with foreign nations and among the several States.' The Circuit Court held the defense good and gave judgment against the port of Mobile. Is the ordinance a violation of the Constitution of the United States? We will

not gainsay that this license tax was imposed as a revenue measure—as a means of taxing the business, and thus compelling it to aid in supporting the city government. That no revenue for State or municipal purposes can be derived from the agencies or instrumentalities of commerce, no one will contend. The question generally mooted is, how shall this end be attained? In the light of the many adjudications on the subject, the ablest jurists will admit that the line which separates the power from its abuse is sometimes very difficult to trace. No possible good could come of any attempt to collate, explain and harmonize them. We will not attempt it. We confess ourselves unable to draw a distinction between this case and the principle involved in *Osborne v. Mobile*, 16 Wall. 479. In that case the license levy was upheld, and we think it should be in this. *Joseph v. Randolph*, 71 Ala. 499.”

In approaching the question thus presented, it is proper to note that the license tax in question is purely a tax on the privilege of doing the business in which the telegraph company was engaged. By the laws of Alabama in force at the time this tax was imposed, the telegraph company was required, in addition, to pay taxes to the State, county, and port of Mobile, on its poles, wires, fixtures and other property, at the same rate and to the same extent as other corporations and individuals were required to do. Besides the tax on tangible property, they were also required to pay a tax of three-quarters of one per cent. on their gross receipts within the State.

The question is squarely presented to us, therefore, whether a State, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one State to another and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the act of Congress passed July 24, 1866, and other acts incorporated in title LXV of the Revised Statutes. Can a State prohibit such a company from doing such a business within

its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done.

Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax, as a condition of doing any particular business, is a tax on the occupation, and a tax on the occupation of doing business is surely a tax on the business.

Now, we have decided that communication by telegraph is commerce, as well as in the nature of postal service, and if carried on between different States, it is commerce among the several States, and directly within the power of regulation conferred upon Congress, and free from the control of State regulations, except such as are strictly of a police character. In the case of *The Pensacola Telegraph Company v. The Western Union Telegraph Company*, 96 U. S. 1, we held that it was not only the right, but the duty, of Congress to take care that intercourse among the States and the transmission of intelligence between them be not obstructed or unnecessarily incumbered by State legislation; and that the act of Congress passed July 24, 1866, above referred to, so far as it declares that the erection of telegraph lines shall, as against State interference, be free to all who accept its terms and conditions, and that a telegraph company of one State shall not, after accepting them, be excluded by another State from prosecuting its business within her jurisdiction, is a legitimate regulation of commercial intercourse among the States, and is also appropriate legislation to execute the powers of Congress over the postal service. In *Western Union Telegraph Company v. Texas*, 105 U. S. 460, we decided that a State cannot lay a tax on the interstate business of a telegraph company, as it is interstate commerce, and that if the company accepts the provisions of the act of 1866 it becomes an agent of the United States, so far as the business of the

government is concerned ; and State laws are unconstitutional which impose a tax on messages sent in the service of the government, or sent by any persons from one State to another. In the present case, it is true, the tax is not laid upon individual messages, but it is laid on the occupation, or the business of sending such messages. It comes plainly within the principle of the decisions made by this court in *Robbins v. The Taxing District of Shelby County*, 120 U. S. 489, and *Philadelphia and Southern teamship Co. v. Pennsylvania*, 122 U. S. 326.

It is parallel with the case of *Brown v. Maryland*, 12 Wheat. 419. That was a tax on an occupation, and this court held that it was equivalent to a tax on the business carried on — the importation of goods from foreign countries — and even equivalent to a tax on the imports themselves, and therefore contrary to the clause of the Constitution which prohibits the States from laying any duty on imports. The Maryland act which was under consideration in that case declared that “all importers of foreign articles or commodities, etc., and all other persons selling the same by wholesale, etc., shall, before they are authorized to sell, take out a license, * * * for which they shall pay fifty dollars,” etc., subject to a penalty for neglect or refusal. Chief Justice TANEY, referring to the case of *Brown v. Maryland* in *Almy v. State of California*, 24 How. 169, 173, in which it was decided that a State stamp tax on bills of lading was void, said: “We think this case cannot be distinguished from that of *Brown v. Maryland*. That case was decided in 1827, and the decision has always been regarded and followed as the true construction of the clause of the Constitution now in question.” * * *

“The opinion of the court, delivered by Chief Justice MARSHALL, shows that [the case] was carefully and fully considered by the court. And the court decided that this State law [the Maryland law under consideration in *Brown v. Maryland*] was a tax on imports, and the mode of imposing it, by giving it the form of a tax on the occupation of the importer, merely varied the form in which the tax was imposed, without varying the substance.”

But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subject to taxation, without the imposition of a tax which covers the entire operation of the company.

The State court relies upon the case of *Osborne v. Mobile*, 16 Wall. 479, which brought up for consideration an ordinance of the city requiring every express company or railroad company doing business in that city, and having a business extending beyond the limits of the State, to pay an annual license of \$500; if the business was confined within the limits of the State, the license fee was only \$100; if confined within the city, it was \$50; subject in each case to a penalty for neglect or refusal to pay the charge. This court held that the ordinance was not unconstitutional. This was in December Term, 1872. In view of the course of decisions which have been made since that time, it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several States.

A great number and variety of cases involving the commercial power of Congress have been brought to the attention of this court during the past fifteen years, which have frequently made it necessary to re-examine the whole subject with care; and the result has sometimes been that in order to give full and fair effect to the different clauses of the Constitution, the court has felt constrained to recur to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice MARSHALL and other members of the court in former times, and to modify in some degree certain dicta and decisions that have occasionally been made in the intervening period. This is always done, however, with great caution, and an anxious desire to place the final conclusion reached upon the fairest

and most just construction of the Constitution in all its parts.

In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary. As a matter of convenient reference we give the following list: *Case of State Freight Tax*, 15 Wall. 232; *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1; *County of Mobile v. Kimball*, 102 U. S. 691; *Western Union Telegraph Co. v. Texas*, 105 U. S. 460; *Moran v. New Orleans*, 112 U. S. 69; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Brown v. Houston*, 114 U. S. 622; *Walling v. Michigan*, 116 U. S. 446; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Wabash Railway Co. v. Illinois*, 118 U. S. 557; *Robbins v. Shelby County Taxing District*, 120 U. S. 489; *Philadelphia & S. M. Steamship Co. v. Pennsylvania*, 122 U. S. 326; *Western Union Telegraph Co. v. Pendleton*, 112 U. S. 347; *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411.

We may here repeat, what we have so often said before, that this exemption of interstate and foreign commerce from State regulation does not prevent the State from taxing the property of those engaged in such commerce located within the State as the property of other citizens is taxed, nor from regulating matters of local concern which may incidentally affect commerce, such as wharfage, pilotage, and the like. We have recently had before us the question of taxing the property of a telegraph company, in the case of *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530.

The result of the conclusion which we have reached is,

Telegraph Co. v. Commonwealth.

that the judgment of the Supreme Court of Alabama must be *Reversed, and the cause remanded, with instructions to reverse the judgment of the Mobile Circuit Court; and it is so ordered.*

NOTE.— See note to next case.

WESTERN UNION TELEGRAPH COMPANY, Plff. in Err., v.
COMMONWEALTH OF PENNSYLVANIA.

U. S. Supreme Court, October 22, 1888.

(128 U. S. 39, reversing 1 Am. Elec. Cas. 756.)

TAXATION OF INTERSTATE TELEGRAMS.

A State cannot tax telegraphic messages sent from points within the State to points in other States ; those sent from points in other States to points within the State ; or those sent to and from points in other States, which pass over lines partly within the State.

Cases of this series cited in opinion : *Telegraph Co. v. Texas*, vol. 1, p. 373 ; *Ratterman v. W. U. Tel. Co.*, ante, p. 68.

THE facts sufficiently appear in the opinion.

M. E. Olmstead, for plaintiff in error.

W. S. Kirkpatrick, Attorney-General of Pennsylvania and *John F. Sanderson*, Deputy Attorney-General, for defendant in error.

Mr. Chief Justice FULLER delivered the opinion of the court :

Judgment was rendered against plaintiff in error for taxes on telegraphic messages sent from point to point within the State of Pennsylvania ; on messages sent from points within the State to points in other States ; on messages sent from points in other States to points within the State, and on messages sent to and from points in other

States, which passed over lines partly within the State; and the record discloses the several amounts of taxes upon the several classes of messages, which, with commissions and interest, make up the total recovery. It is clear, and this is conceded by the defendant in error, that, under the decisions in this court in *Telegraph Company v. Texas*, 105 U. S. 460, and *Ratterman v. Western Union Telegraph Company*, 127 U. S. 411, the Commonwealth was not entitled to recover for the taxes in question, excepting in respect to the messages transmitted wholly within the State. *The judgment will therefore be reversed, and the cause remanded for such further proceedings as justice may require.*

NOTE.—The foregoing five cases deal with the power of a State to impose taxes or penalties upon telegraph companies in respect to interstate telegrams or upon those who have availed themselves of the provisions of the act of Congress of July 2, 1866.

In 1876 the Supreme Court commission of Ohio decided, in *W. U. Tel. Co. v. Mayer*, 1 Am. Elec. Cas. 214, that a tax on the gross receipts of a telegraph company, even from interstate commerce, is not a tax on commerce so as to be obnoxious to the Constitution of the United States. No appeal seems to have been taken from that decision, but in 1881 the U. S. Supreme Court, reversing the Supreme Court of Texas, decided (*Telegraph Co. v. Texas*, 1 Am. Elec. Cas. 373) that a fixed and level tax on all messages sent, without regard to distance carried or price charged, was, so far as it operated on private messages sent out of the State, and on government messages, void.

In 1884, the Supreme Court of Indiana, having in mind and under consideration the U. S. Supreme Court decision in *Telegraph Co. v. Texas*, decided (*W. U. Tel. Co. v. Pendleton*, 1 Am. Elec. Cas. 632) that the statute of that State imposing a penalty upon telegraph companies in respect to erroneous or delayed telegrams was valid even as to messages to be transmitted without the State. That decision was reversed at page 50, *ante*.

It had meantime been followed in *W. U. Tel. Co. v. Meredith*, 1 Am. Elec. Cas. 643, and *W. U. Tel. Co. v. Ferris*, id. 782.

The decision of the State Supreme Court in *W. U. Tel. Co. v. Commonwealth* may be found in 1 Am. Elec. Cas., at page 756. *W. U. Tel. Co. v. State Board of Assessment*, 1 Am. Elec. Cas. 844, was also reversed at 132 U. S. 472.

Statements that the two last named cases had been reversed were prepared for insertion in vol. 1, but were inadvertently omitted in printing.

A more extended note upon this subject will be reserved for vol. 3.

See INDEX to vol. 1, titles "Constitutional Law," "Interstate Commerce," "Post-roads Act," "Taxation."

THE COMMONWEALTH OF PENNSYLVANIA v. THE AMERICAN
BELL TELEPHONE COMPANY.

Pennsylvania Supreme Court, June 28, 1889.

(129 Pa. St. 217.)

TELEPHONE COMPANY.—TAXATION.

A foreign corporation, having no office, agent or place of business, in Pennsylvania, and merely owning instruments, which it leases to the resident corporations operating them, under contracts made in another State, and having no property here except the telephones, cannot be taxed here upon its capital stock, although it reserved certain power over them and might, upon breach of certain conditions, resume possession of and operate the instruments.

ERROR to Court of Common Pleas of Dauphin county, to which court an appeal had been taken from the decision of the Auditor-General and State Treasurer that the capital stock of the telephone company was taxable. The Common Pleas decided to the contrary, and the Commonwealth appealed

W. S. Kirkpatrick, Attorney-General, and *John F. Sanderson*, Deputy Attorney-General, for the appellant.

Wayne Mac Veagh, *H. E. Olmsted*, and *S. B. Huey*, for the appellee.

Before PAXSON, C. J., GREEN, WILLIAMS, McCOLLUM, and MITCHELL JJ.

Opinion by PAXSON, Chief Justice: This was an attempt on the part of the Commonwealth to tax the capital stock of the American Bell Telephone Company to the extent that its capital was employed in “doing business within this Commonwealth.” Under the facts as found by the court

below, we are very clear the Commonwealth is not entitled to collect such tax. The company is a corporation created by the laws of the State of Massachusetts. Its principal office or place of business is in the city of Boston. It has no office, agent, or place of business in this State. All the contracts for rent and royalty of telephones were made in Boston, and the payments therefor were made there. It leases to certain Pennsylvania corporations the use of the telephones and furnishes the instruments, which remain the property of the company, and are to be paid for, whether used or not. The Pennsylvania corporations carry on the business here. They construct and own the necessary lines of wire, switches, switchboards, and other apparatus necessary to carry on the business. They maintain their own offices, and employ and pay the officers and agents needed to carry it on. The telephone company transacts no business here; it has no part of its capital or property here, except the instruments in question, which, as before observed, are leased to Pennsylvania corporations with a license to use the same. Under such state of facts it would seem clear that the telephone company could not be taxed as doing business within this State.

It was contended, however, on the part of the Commonwealth, that because the company had, in its contract with the Pennsylvania corporations, reserved a certain power of control over telephones leased to them, and might, upon certain breaches of said contracts, enter upon, take possession of, and operate said telephones, the said company was doing business here, and became liable to the tax. There is a wide distinction, however, between the right to do business and actually doing it. It may be that should said company proceed to enforce rights under these contracts, and, after taking possession of the telephones, operate them, it would be doing business here. But that contingency has not arrived. It is to be observed that this was not a tax upon the instruments owned by the company, and operated here under license. The instruments as such are perhaps within the taxing power of the Commonwealth, for the reason that

they are here, and within her jurisdiction. It matters not to the State to whom they belong. But the State has not laid such a tax; on the contrary, it is a tax upon capital stock; and as the company transacts no business within the State, no portion of its capital is here in point of fact or by construction of law. Authorities are scarcely needed for so plain a proposition. It is sufficient to refer to *Commonwealth v. Standard Oil Co.*, 101 Pa. 119.

Judgment affirmed.

CLARK and STERRETT, JJ., absent.

NOTE.—The foregoing is the the only case in this volume in which the question of taxation (distinguished from license fee) of telegraph or telephone companies arises, except in reference to interstate telegrams.

In *Erichsen v. Last*, 45 Law Times, 703, the English Court of Appeal held that a telegraph company resident at Copenhagen, having three marine cables which landed at different places in England, connected with separate wires provided by and under the control of the post-office, as provided by statute, but worked by the company's servants, was chargeable with a tax on the profits derived from sums paid in England for the transmission of messages.

In *Electric Telegraph Co. v. Overseers of the Poor of Salford*, reported in 24 Law Journal, N. S., and reprinted in Allen's Tel. Cases, p. 27, it was held that a telegraph company was liable to be rated for the benefit of the poor, upon its wires, poles, and the land on which they stood, although a railroad company had the right to order the removal of the post at any time.

In *Lancashire Teleph. Co. v. Overseers of the Poor of Manchester*, 52 Law Times Reports, 793, it was held that telegraph wires occupy land and are therefore ratable for the relief of the poor.

In *Paris and New York Telegraph Co. v. Penzance Union*, 50 Law Times Reports, held, that where the Postmaster-General had licensed the use of special wires to a telegraph company, the wires were not ratable.

In *W. U. Tel. Co. v. Tennessee*, 1 Am. Elec. Cas. 326, it was held that a telegraph line is real estate for purposes of taxation.

Massachusetts v. W. U. Tel. Co., 141 U. S. 40, and *People, ex rel. W. U. Tel. Co. v. Dolan*, 126 N. Y. 166, are important cases upon the taxation of telegraph companies, which will appear later in this series.

CITY OF CHESTER v. THE WESTERN UNION TELEGRAPH
Co. ET AL.

C. P. of Delaware County, Pa., April 5, 1886.

(3 Lancaster Law Review, 164.)

LICENSE FEE.

A municipal corporation has power by ordinance to impose a reasonable license fee upon telegraph companies using its streets for the maintenance of their lines ; such an ordinance is a proper police regulation.

Whether or not a license fee is reasonable, is a question of law to be determined by the court.

A license fee of one dollar per pole and a penalty of five dollars for violating the ordinance, held not unreasonable.

That a telegraph company is not, at the time the fee is imposed, actually engaged in business, does not relieve it from paying the fee.

O. Harvey, for the plaintiffs.

Wm. Ward, for the defendants.

Opinion by CLAYTON, P. J. : Since the trial of these cases the parties have agreed upon all the facts. The agreement is in writing, and is to be filed and made a part of the record.

The plaintiff, however, does not waive his point that the jury and not the court are to decide the question of the reasonableness of the city ordinance requiring the license fee and imposing the fine for violation of its provisions.

The facts proved and agreed upon are as follows : That the ordinance of May 5, 1884, was passed in due form ; that the entire number of poles maintained by the defendants is 450 ; that, in addition to the poles maintained by the defendants, the Baltimore and Ohio Company maintain 93 poles ; that the lines of the Western Union and Dela-

ware and Atlantic companies form interstate communication, and that the Western Union has communication with foreign countries; that the Philadelphia, Reading and Pottsville Company does no commercial business, its line being used exclusively for the Chester branch of the Philadelphia and Reading Railroad; that the value of the instruments and other property of said companies located in Chester is as follows: Western Union, \$200; Delaware and Atlantic, \$800; Philadelphia, Reading and Pottsville, \$100.

The city agreed to waive its right to sue for the penalties imposed by its said ordinance pending this litigation, and the defendants agreed to waive all defense or objection to the form of action.

The suits are, therefore, to be looked upon as amicable actions to test the validity of the said ordinance. The cases should, under the agreement of counsel, be tried upon their merits, without regard to the pleadings or the form of action.

An exception was taken to the admission of the ordinance in evidence, on the ground that it showed upon its face an attempted exercise of *ultra vires* powers.

Defendants also contended that the ordinance was void because of the unreasonable license fee charged for the maintenance of each pole.

The following point was also agreed to be presented as if it was negatived by the court: "In any event there can be no recovery against the Philadelphia, Reading and Pottsville Company, inasmuch as it transacts no commercial business, and is used in conjunction with and as a part of the operation of the railroad."

The jury were directed to find for the plaintiffs, subject to the following point of law reserved: "Whether the license fee of one dollar per pole (the number of poles being admitted), and the penalty of five dollars for violations of the ordinance, are so unreasonable as to render the ordinance void."

Counsel for the plaintiffs excepted to the reservation of

this point, on the ground that it was for the jury to decide whether the ordinance was or was not unreasonable.

The only questions now to be decided are :

1. Is the ordinance on its face *ultra vires* ?
2. Is its license fee and penalty unreasonable ?
3. Is the question of the unreasonableness of the ordinance to be decided by the court or by the jury ?
4. Does the fact that one of the companies now does no commercial business relieve it from the operation of a proper police regulation ?

Is the ordinance on its face *ultra vires* ? The argument is that the fourth section attempts to deprive the defendants of their franchises. This is a mistake. The ordinance does not attempt to deprive the defendants of their franchises ; it only, as a police regulation, controls the manner in which the public highways shall be occupied by these and other companies and individuals having an equal right to their use. It is only necessary to refer to the authorities so ably cited and commented upon by Mr. Bispham in the MSS. case of the *City of Philadelphia v. Telegraph Companies*, C. P. No. 2, Phila., June T., 1883.

Really the only serious question in the case is the unreasonableness of the license fee. On the argument the plaintiffs contended that this was a question for the jury, and that the court erred in not submitting it to them.

I am clearly of opinion this question is one of law. If the facts were disputed it might be a mixed question ; but in this case the facts are undisputed. In all cases the court may require the jury to find a special verdict, and it then becomes the duty of the court to apply the law. Let us suppose the jury had found the facts specially. That is to say, that the ordinance had been regularly passed ; that there were a certain number of poles ; that the actual cost to the city for enforcing the ordinance was a certain sum ; that the revenue derived from the poles was also a certain sum, with the other facts found and agreed upon, and that, under these facts, they left it to the court to say whether the charge was so unreasonable as to render the ordinance

void, etc. In such case the question would undoubtedly be for the court. Where the facts are not disputed, the question of reasonable notice, or of due diligence, or of reasonable time, or undue delay, are always questions of law. To submit such questions to the jury would result in countless conflicting verdicts. It has been held that where the facts are settled, the question whether a building is old or new, under the mechanics' lien law, is for the court. The true principle by which we are to decide whether a question is for the court or for the jury, is laid down in *Smith v. Nelson*, 2 Phila., 113.

Wherever the facts are found, or undisputed, to avoid the uncertainty of conflicting verdicts, the legal inference, whether easy or difficult, is to be drawn by the court. I have no doubt of the power of the city to pass ordinances, as a police measure, to regulate the use of the streets. If every traveler, owners of houses and stores, all common carriers, gas companies, pedestrians and horsemen, and the city itself, for the purpose of sewerage, sanitary and other purposes, have the right to use the streets in common with these telegraph and telephone companies, it is quite obvious that there would be endless conflict, if might and not rule were to settle the right of occupancy. The law with its reason is well stated in *Western Union Telegraph Co. v. The City of Phila.*, 2 W. N. C. 455.

It is there held that such ordinances are to have a liberal construction in favor of the city. If we give the ordinance of Chester a liberal construction, it will be impossible to say that a charge of one dollar annually for each pole maintained in the public streets is unreasonable. The value of the police service must depend more on what it might be worth than what it is actually proved to have cost. The license fee should be sufficiently high to indemnify the city for all probable expense. It ought not to be so high as to amount to a prohibition of the business. The city assumes a great responsibility. It must provide a tribunal to try conflicting claims to the use of the streets. It must locate the poles so as to do as little injury as possible to private

property. It should employ men of ability and good judgment in such matters. That it has been able to get along heretofore without much expense has nothing to do with the question. The ordinance is not made for a day, but for the probabilities of the future. Its fire department may be obstructed by these poles and wires. Its own use of the streets for telegraphic purposes may be obstructed. The expense of adopting and keeping up a proper system of inspection, office room, and clerical assistance must be considered.

It will be observed that when objection is made to the planting of any pole at any particular place, the parties are to be heard and the question decided. This implies a great amount of probable trouble and expense, involving counsel fees, bills in equity, injunction, appeals and all the proverbial delays of law. It is impossible to say, as the business increases and new companies enter the city, what the expense of this police regulation may be. It is quite certain that it may exceed the trifling sum of one dollar a year for each pole. The sum received from these companies (\$543) each year, would not pay one man for the services which might reasonably be required of him to perform this police duty.

I agree with the referee in the Philadelphia case, cited by defendant's counsel. There are a very large number of poles and an immense amount of wire used in the business in Philadelphia. The charge for a license there is five dollars a pole, two dollars and fifty cents per mile of wire, and a penalty of fifty dollars a day for failure to take out a license, etc. The learned referee decided that the fee and penalty were unreasonable, but that the city had the power to pass an ordinance charging a reasonable license fee for the service required of the city, in properly regulating the use of its streets. When we compare the modest fee charged by the Chester ordinance with the truly oppressive one charged by the Philadelphia authorities, all resemblance between the two cases is lost.

I cannot at present see the bearing of the admitted fact,

that some of these companies maintain interstate communication, upon the issue raised in this case. If it is intended to argue that the acts of Congress have any bearing upon the issues, we need only refer to the case of *The City of Philadelphia v. The Western Union Telegraph Co.*, 2 W. N. C. 455, which clearly decides that the power given by the act of Congress to construct lines over post-roads does not apply to the streets of a city, which are owned by the State.

The mere fact that one of these companies does not now transact commercial business has nothing whatever to do with the case. Its charter gives it the right to transact such business, and *non constat*, it may at any time find it profitable to do so. But even if it had not the power to transact general business, this is no reason why it should be permitted to obstruct the streets of the city free from police regulations.

The motion for a new trial is dismissed, and judgment for the plaintiff on the point reserved.

NOTE.—For other cases on this subject, see note to *New Orleans v. Great So. Teleph. & Tel. Co.*, *post*.

WESTERN UNION TELEGRAPH COMPANY v. CITY OF PHILADELPHIA.

MUTUAL UNION TELEGRAPH COMPANY v. SAME.

Pennsylvania Supreme Court, Jan. 23, 1888.

(22 Weekly Notes of Cases, 39.)

TELEGRAPH COMPANIES.—LICENSE FEE.

Telegraph companies may be properly subjected to a reasonable license fee by municipalities through whose streets they pass. An original license fee of five dollars per pole and an annual fee of one

Telegraph Companies v. City of Philadelphia.

dollar per pole and \$2.50 per mile of wire is not so obviously excessive as to warrant the court in adjudging the ordinance fixing it to be invalid.

WRITS of error to the Common Pleas No. 2 of Philadelphia County.

These were two actions of debt brought by the city of Philadelphia against the Western Union Telegraph Co. and the Mutual Union Telegraph Co., respectively, to recover the license fees imposed by the city ordinances upon telegraph poles and wires within the limits of said city.

The cases were referred to a referee, George Tucker Bisham, Esq., who found the facts to be as follows: By an ordinance of the city of Philadelphia, approved January 6, 1881, all telegraph companies are required to pay a certain charge of one dollar per pole per annum on all poles erected by them within said city. And by an ordinance approved March 30, 1883, said companies are also required to pay a certain charge of two dollars and fifty cents per annum per mile of suspended wire owned by them and erected within said limits. The defendant companies claiming these charges to be illegal, and such as the city had no power to impose, refused to pay the same as sought to be imposed for the year 1883, and the city of Philadelphia then brought this suit to compel their payment.

The referee reported: (1) That the charge sought to be recovered by the city could not be maintained as a tax, because it is not within the power of taxation which has been delegated to the city by the State; (2) That the charges are unreasonable as license fees, and operate in substance as a tax, and that the ordinances were therefore void.

Upon exceptions filed thereto by the city, the court, after argument, dismissed the exceptions and confirmed the report of the referee, and the city then took a writ of error to the Supreme Court. Before any argument was had, however, the writ of error was discontinued, and the record taken back to the lower court, which then re-opened the case, and sent the matter back to the referee to report on three questions specified by it, viz.: (1) Whether the

city has authority to allow or prohibit telegraph poles or wires through the streets of the city; (2) Whether it can exact a fee or payment as a condition for their erection or continuance; and (3) Whether the ordinances now in controversy are a valid exercise of such authority, if it exists.

Upon these questions the referee reported: (1) That the city has no authority of allowance or prohibition; and (2 and 3) That the payment sought to be exacted was an unreasonable one as a license fee, and judgment should be entered in favor of the defendants.

To this report the city again filed exceptions, which were sustained by the court in the following opinion by HARE, P. J.:

“On two of the points presented by this case the able report of the referee is so conclusive that little more is needed from the court. The license fee of \$1, demanded by the city of Philadelphia for each telegraph pole erected in the streets, is, as he has found, manifestly invalid if considered as a tax. There is no warrant for it in the city charter, and if there were it would fail from the want of the indispensable preliminary of assessment, without which the exercise of the taxing power is an arbitrary taking of private property for public use. This was frankly conceded on behalf of the city in the argument before the referee, and subsequently when the case was heard in court.

“We think it not less clear, as the referee reports, ‘that the city of Philadelphia has a perfect right, as a matter of police regulation, to supervise and control the erection of poles upon and the stretching of wires along its streets.’ As he well observes: ‘To say that a corporation or an individual which has the right, either as a chartered body or as a natural person, to erect poles on the public highways, can do so without any restraint whatever, and without any liability to have the exercise of that right regulated with reference to the rights of other persons exercised upon the same highways, or, to the rights of the

municipality, appears to me to be the assertion of a proposition which would practically take the control of the streets out of the hands of the city and place it in the hands of individuals or corporations.'

"The streets are already lined with masts sustaining an intricate web of wires, actually or potentially charged with an electric current which is dangerous unless approached with caution, and no argument is requisite to show the inconvenience that might result if the number could be indefinitely increased. They are used not merely for telegraphy, but for telephones, and for the transmission of electricity as a source of motive power and illumination ; and much as they have multiplied in the past, we may believe that in the near future they will be still more numerous. If a fire occurs, the wires impede the erection of ladders and must be cut with proper implements before the firemen can ascend to the roofs. That some regulating hand should be applied under these circumstances for the protection of the public is apparent ; and it is not less necessary, for the sake of the various companies, which, acting in a limited area and by analogous means, might otherwise be brought into conflict. We have recently had to consider a motion by the attorney-general of the State, at the instance of an underground telegraph company, for an injunction against the wires which run overhead, and although the application was refused, the evidence on either side gave cause for reflection. The founder of our city was a man of liberal views, whose ideas were on many points in advance of his age, and if the plan of Philadelphia, as devised by him, be compared with that of any other city then existing on the globe, we may admire his forethought in providing for the space and air which are wanting in European capitals ; but he could not reasonably anticipate that the population of an obscure provincial town would, in the course of two centuries, grow to nearly a million of souls, with a prospect of a still larger increase in the next hundred years. Still less could he have foreseen that in addition to the sewers, the water-pipes and the lamp-posts, which he presumably

contemplated. although the two former were as yet practically unknown in England, gas would be introduced as a means of light, of heat and of power; that electricity would be discovered and applied for the attainment of the same ends; that companies would be legislatively authorized to use the highways as channels for the transmission of steam; or that railways would intersect the streets, or be carried along on structures overlooking the houses, and leaving scant room for the passage of ordinary vehicles.

Agreeably to the second section of the act of April 29, 1874, any five persons may unite to form a company for the maintenance and construction of a telegraph line; for the supply of water to the public; for the supply of ice to the public; for the manufacture and supply of gas, or for the supply of light and heat to the public by any other means; and the Governor must, if the requisite forms have been observed, direct the issue of letters patent. By the thirty-third section of the same act, telegraph companies so incorporated are authorized 'to construct lines of telegraph along or upon any of the public roads, streets or highways, by the erection of the necessary fixtures, including posts, rails or abutments.' The thirty-fourth section empowers companies formed for the supply of water, of gas, of light, or of heat by any means, 'to enter upon any public street, lane, alley or highway, for the purpose of laying down pipes and altering, inspecting or repairing the same, doing as little damage to said streets, etc., and impairing the free use thereof as little as possible.' Why the Legislature was thus deposed or abdicated, leaving a matter which eminently needs coördination, to chance, may be gathered from the debates in the convention; the court is simply concerned with the result.

We have here a spectacle that almost bewilders the imagination. In addition to sewers, the water and gas pipes, with which the soil of our highways is already tunnelled for municipal purposes, with a consequent liability to be torn up whenever a sewer bursts or a main is in

need of repairs, any company authorized as above to supply heat, light or power, may burrow side by side with the municipality at the risk of bringing steam, water, gas and electricity into such close conjunction as will give rise to explosions like those recently witnessed in London and Philadelphia. Nor is this all; if we look above ground we may find reason to apprehend that the occupation of streets by structures erected for purposes which, though beneficial, are foreign to the original design, may, if these are unduly multiplied, lead to injurious consequences. Had Penn anticipated such a result, he no doubt would have made all the principal streets as wide as Arch or Market streets, but unfortunately many of our thoroughfares are too narrow for the tide of traffic and the municipal uses to which they are necessarily put, and certainly do not afford room for the multifarious works that may be superadded whenever any five men think fit to claim the privilege.

“Everyone who considers the circumstances which I have inadequately portrayed, and the complications to which they may give rise, will, I think, agree that the city should have some supervision and control in a matter which deeply concerns her citizens, and the need will be distinctly apparent if we reflect that she is responsible for the condition of the highways, and may be made answerable in damages for a want of care in guarding against the accidents that are only too likely to occur. Should a sewer burst, or a gas main explode and injure persons or property, or were one of the numerous telegraph poles to be blown down by a gale of wind with a like result, the city would be the first mark in a suit for compensation. It is, therefore, her right and duty in the interests of humanity, and that her financial burdens may not be unduly increased, to keep a watchful eye on acts which, although done by persons claiming under a higher source, are yet so interwoven with matters in which she is directly concerned, that it is difficult to draw the line and say where her responsibility ends.”

“We are, therefore, unable to agree with the referee that

a license fee of \$1 is so clearly excessive as to justify the court in treating it as invalid. The question is not, in our opinion, merely what it will cost the city to take care that the telegraph poles are sound and in good order, that the wires are properly hung, and do not, by "fouling" the city wires, hinder the transmission of police messages and fire alarms. It is an established principle that remuneration should be in proportion not only to time and outlay, but to responsibility, and a public or private agent who is exposed to loss may demand higher pay. That such is the relation of the city to the various companies which have been empowered to occupy its streets with a view to gain, is to me abundantly clear, and they should not grudge a reasonable compensation for the space they occupy and the risk which she incurs on their account. That the rate cannot readily be determined is no doubt true, but this circumstance affords an argument for the city, because there is a presumption in favor of the acts of public bodies within the scope of their powers. The question is not would we name \$1 as a reasonable fee, but is it so plainly in excess as to render it our duty to reverse the decision of councils? On this point, as I have already intimated, we are of opinion with the city, and therefore sustain the exceptions which she has filed, and send the case back to the referee for reconsideration on the above point."

The referee being of opinion that he had no further discretion in the premises, assessed the damages according to the evidence adduced before him as to the number of poles and miles of wire erected and maintained by the companies defendant respectively. Judgments for the plaintiff were entered upon the report. The companies defendant thereupon took these writs, assigning for error the action of the court in sustaining the exceptions to the second report of the referee and the entry of judgments for the plaintiff.

Silas W. Pettit (with him *John R. Reed* and *Willard Brown*), for the plaintiffs in error.

 Philipsburg v, Telephone and Supply Co.

Robert Alexander, assistant city solicitor (with him *Charles F. Warwick*, city solicitor, and *Charles B. McMichael*, assistant city solicitor), for the defendant in error.

The COURT. That the companies defendant were and are properly subjected to a reasonable license fee, is not an open question, and we concur with the court below in its conclusion that the fee charged is not so obviously excessive and unjust as to authorize a revision of the action of the city councils.

Judgment in each case affirmed.

NOTE.— This case is cited in the following cases in this volume : *Borough of Philipsburg v. Cent. Pa. Teleph. and Supply Co.*; *Lancaster v. Edison Electric Illum. Co.*

For other cases upon the same subject, see note to *New Orleans v. Great So. Teleph. & Tel. Co.*, *post*.

BOROUGH OF PHILIPSBURG v. CENTRAL PENNSYLVANIA
TELEPHONE AND SUPPLY COMPANY.

Common Pleas of Centre Co., Pa., Nov. 9, 1888.

(22 Weekly Notes of Cases, 572.)

TELEPHONE COMPANY.— LICENSE TAX.

The borough of Philipsburg, incorporated under the general borough laws of the State of Pennsylvania, has no authority to impose a license tax upon telephone companies using its streets.

Cases of this series cited in opinion : *W. U. Tel. Co. v. City of Philadelphia*, and *Mut. Un. Tel. Co. v. Same*, *ante*, p. 98.

CASE stated, the facts of which sufficiently appear in the opinion of the court.

D. H. Hastings and *Wilbur F. Reeder*, for plaintiff.

Philipsburg v. Telephone and Supply Co.

Robert P. Allen and John G. Reading, for defendant.

Opinion by FURST, P. J. The COURT: The borough of Philipsburg was incorporated by a decree of the court on the 29th day of November, 1864, under the general borough laws of April 1, 1834, and April 3, 1851, subject to all the limitations and restrictions in said acts, and possessing all the powers and privileges conferred by the same.

The defendant company is a corporation created under the general corporation act of 1874 and its several supplements; and as such corporation it is liable for and pays tax to the Commonwealth of Pennsylvania upon its gross receipts and dividends under the act of June 7, 1879, relating to revenue by taxation. This tax was paid for the years 1886 and 1887 to the Commonwealth.

This company was chartered by letters patent September 20, 1880, and immediately thereafter acquired from R. M. Baily the poles, wires, etc., which he had previously constructed in the borough of Philipsburg, and subsequently the company erected other poles, making the total number in November, 1884, fifty-two.

The council of the borough passed an ordinance on April 5, 1886, which was duly approved on the ninth, entitled an ordinance granting permission to defendant company to erect poles and run wires on the same over or under any of the streets, etc. It is set forth in full in the report.

The fifth section thereof is as follows:

“That said company shall and will pay on the first day of July, to the said borough, for such privilege, annually, the sum of twenty-five per centum of the monthly charge for a telephone in said borough for each and every pole *now* erected or hereafter to be erected within the limits of said borough.”

This amounts to a charge of one dollar per pole, making an annual claim of fifty-two dollars. No poles have been erected since the passage of the ordinance. The defendant has never accepted the provisions of this section.

The plaintiff has demanded the sum of fifty-two dollars,

being the first year's claim from April 5, 1886, to April 5, 1887. The defendant refused payment.

The question for the court to determine is whether or not the defendant is liable to the plaintiff for this annual charge.

It is conceded, if it be a tax, there is no authority to assess or levy it. It has not been assessed by any proper officer, and there is no authority vested in this municipality or any other to lay a tax upon telephone poles as a species of personal property. These constitute part of the franchise of the company; their value is not in the pole itself, but the purpose for which it is applied in becoming part of the machinery for the transmission of the electric current. On this franchise or corporate right the taxes were properly paid to the Commonwealth under the act of 1879.

Has the borough of Philipsburg legislative authority to demand this sum as an annual *license tax* for the privilege conferred?

The distinction between a tax and a license tax under the facts of this case is not very apparent. It is difficult, indeed, to distinguish the one from the other.

If the ordinance had preceded the erection of the poles, it might well be said it gave the license to the defendant to enter and erect the poles within the limits of the borough. It was not necessary, however, for that purpose, as the poles had all been erected at least two years before under the direction of the council's officer, the street commissioner, who, no doubt, acted by authority, although this is not shown in the record.

The fact that this ordinance was not passed to grant the privilege to defendants to introduce the poles and wires into the borough until two years after the same was done, seems to us to be almost conclusive that it was not intended as an ordinance to regulate the same but an attempt to tax the property of the company. Nevertheless, we will regard it as in the nature of a license tax or privilege.

In this view of the case, what are the rights of defendant; and, secondly, what are the powers of the council under the general borough laws of 1834 and 1851, and the corporation act of May 1, 1876 (Ph. Laws, page 90)?

By the first clause of the 33rd section of the act of the 29th April, 1874, authority is given to construct lines of wires along and upon any of the public roads, streets, lanes or highways, or across any waters within the limits of this State, by erection of the necessary fixtures, including posts, piers or abutments for sustaining the cords or wires of such line, but the same shall not be constructed so as to incommode the public use of said roads, streets, highways, etc.

At this period little was known of the telephone, and the act was, therefore, limited to telegraph companies. It was afterwards, however, extended to all companies for the transaction of any business in which electricity over or through wires may be applied to any useful purpose.

Act of May 1, 1876 (Ph. Laws, 90). This act gives the corporation the right to construct, maintain, and lease lines for the transaction of any business in which electricity may be applied to any useful purpose. Before the exercise of any of the powers given under this act, application must first be made to the proper municipal authority for permission to erect poles. We will refer again to this section of the act.

What are the powers conferred upon boroughs under the general law? Referring to the act of the 3rd of April, 1851, Purdon's Digest (page 202, pl. 48), we find among these powers the following:

“To make such laws, ordinances, by-laws and regulations not inconsistent with the laws of this Commonwealth as they shall deem necessary for the good order and government of the borough.”

This certainly includes police power, which has been held to include protection of life, health, and property, maintenance of good order and public morals. Dillon, 3rd edition, section 141.

This is even so at common law. These ordinances must,

however, be reasonable, and for the common benefit, not in restraint of trade nor imposing a burden without apparent benefit. *Commissioners v. Gas Company*, 2 Jones, 321.

Boroughs in general have not the power to pass ordinances prohibiting the erection of frame buildings within their limits. This requires specific legislative authority. *Kneedler v. Norristown*, 100 Pa. St. 368.

Police power means internal regulation and government. It is applicable to a State, city, county or any other minor division. Therefore to distinguish a police power from any other power of the municipality, we must look to its scope, object and effect ; it must relate to government or internal regulation.

Upon a careful examination of the laws relating to boroughs in general, we find no authority vested in council to levy a license tax, such as appears in the fifth section of this ordinance. It is not authorized by *purely* police power in the absence of appropriate legislation. Does the act of May 1, 1876, confer this power?

Section 4 provides :

“That before the exercise of any of the powers given under this act, application shall be first made to the municipal authorities of the city, town or borough in which it is proposed to exercise said powers, for permission to erect poles or run wires on the same, or over or under any of the streets, lanes or alleys of said city, town or borough, which permission shall be given by ordinance only, and may impose such conditions and regulations as the municipal authorities may deem necessary, provided that the cities of the first class shall be exempt from the provisions of this act.”

The first four sections of the ordinance embrace every reasonable term, condition or regulation necessary for the introduction of the poles and wires into the borough, and the maintenance of the same. The fifth section is neither a condition nor a regulation ; these are provided for in the preceding section. The thought of this section can be expressed as follows: “We have granted permission to enter ; we have prescribed the terms and conditions regulating the construction of the poles ; we now intend to

require a revenue to be paid into the borough treasury—a revenue many times in excess of what a local tax would be, based upon the value of the property.”

There is no word used in the act of 1876 which by implication could refer to a license tax. The word “condition,” as therein used, relates to the manner and construction of the poles and wires, which the act declares may be necessary in the judgment of the authorities. *Such necessary conditions and regulations* council may require to be performed.

We are aided in the construction of this act by other acts of Assembly relating to the same subject matter. The act dividing cities of the State into three classes, regulating the passage of ordinances, etc., approved May 23, 1874 (Ph. Laws, page 239, section 20, clause 4, under the head of “Powers of Councils,”) *inter alia*, provides: “To levy and collect license tax on auctioneers, telegraph companies or agencies,” etc.

The act of May 24, 1887, dividing the cities of the State into seven classes, prescribing general regulations relative to the passage of ordinances, etc., under the head of “Corporate Powers of Cities,” article 7, section 1, clause 4, page 217, provides for the levy and collection for general revenue purposes of an annual license tax on auctioneers, telegraph, telephone, steam heating, natural gas, electric light or power companies, etc.

The city of Philadelphia, by act of 15th April, 1850, page 469, is authorized to issue licenses to omnibus lines, * * * and to charge a reasonable annual fee for the same. Where this power exists it is very clear the exercise of it naturally falls under police regulation; it becomes part of the government of the municipality. It is so held in *Passenger R. R. Co. v. City of Philadelphia* (8 P. F. S. 119).

In the case of *Bennett v. The Borough of Birmingham* (7 Casey, 15) the Supreme Court, in referring to similar statutes and especially to the act of February 27, 1852, authorizing the burgess and town council of the borough to levy a moderate license upon all owners of carts, wagons,

etc., using the paved streets, says: "Such statutes and ordinances are contrary to the usual course of taxation and embarrassing to the public, and ought to be strictly construed. We might also refer to many other special acts relating to the cities of Philadelphia and Pittsburgh, and also to other municipalities in the State, giving express authority to levy a special license fee or tax upon the exercising of corporate rights, franchises and privileges within the same.

The above citations are sufficient to show that wherever the legislature intended to grant the right to municipal authorities to levy a license fee or tax, the express power was given, and where it was not given, the right does not exist.

The authority vests in legislative enactment, and not in police regulation. These principles are clearly held in Dillon on Municipal Corporations (3rd edition, sections 357, 358, 359, 360 and 361). In section 361, this author says: "Even the right to license must be plainly conferred, or it will not be held to exist." Thus the power to make by-laws relative to hucksters, grocers, etc., does not authorize the corporation to exact a license from persons carrying on such business.

Where the charter gave the corporation the power to license bakers, and to prohibit sales of bread except by those licensed, the court doubted whether under this, aside from the taxing power of the corporation, an ordinance could be supported which required twenty dollars to be paid by the baker for a license, although it admitted that the corporation could require a fee for issuing and registering the license. *Mayor of Mobile v. Yuille*, 3 Ala. 137. This doctrine is also strongly maintained by Judge Cooley on Constitutional Limitations, page 201.

The principle under consideration was before the Supreme Court in the case of the appeal of the *City of Pittsburgh*, 18 Weekly Notes, 537. The act of May 29, 1885 (Ph. Laws 29), provides for the incorporation and regulation of natural gas companies.

Section 2 provides for giving the right to enter upon streets, lanes, alleys, etc., for the purpose of laying down pipes, etc., and subject to such regulations as the city council may by ordinance adopt. Section 13 enacts that no such gas company shall enter upon or lay down their pipes, etc., on any street or highway of any borough or city without the permission of the councils of such borough or city, by ordinance duly passed and approved. The People's Gas Company of Pittsburgh was organized under this act, and proceeded to lay their pipes in the streets of the city.

The councils passed an ordinance giving assent to the laying of such pipes, but coupled this permission with severe restrictions and conditions ; among others, requiring the gas company to provide for repaving the streets so occupied, or keeping them in repair for nine months, and also further requiring them to furnish free of costs all gas necessary for use in certain of the public buildings along the line of the pipes, etc.

The gas company filed a bill against the city, praying for an injunction to restrain the city from preventing complainants from taking such action, alleging that the city council had sought to exact from complainants unreasonable conditions, as precedent to the right granted to it by the first section of the ordinance of December 29th, 1885, etc.

The Supreme Court, after referring to the 11th and 13th sections of the act authorizing the incorporation of natural gas companies, and the extent of authority thus given, says: "So far as limited authority to legislate on these particular subjects has been delegated to councils, to that extent only can the corporate powers, rights, and privileges of natural gas companies be qualified or limited. Councils are authorized to give or withhold their assent without more. They have no right to couple their assent with any condition or restriction not imposed by the act, unless the company agrees to accept the same and be bound thereby ; and even then the conditions or restrictions so

accepted by the company must harmonize, and in no wise conflict with the provisions of the act. The assent of councils being given, the regulations they are authorized to adopt are such only as relate to the manner of laying pipes, altering, inspecting, and repairing the same, and the character thereof with respect to safety and public convenience, etc.”

The principle established in this case seems to us to rule the question involved in the present case. The defendant, like the gas company in Pittsburgh, refused to accept all the provisions of the ordinance and the rights of the parties, therefore, must be determined under legislative authority, and not as upon contract or agreement.

The case of *Johnson v. Philadelphia*, 60 Pa. St. 445, which affirms the validity of an ordinance, imposing an annual license fee of thirty dollars upon each street car, is not applicable to the present case. In this case the authority to impose the license was conferred by the act of the Legislature; the only question, therefore, could be as to the reasonableness of the charge for the license as a police regulation.

The authority to impose the license fee existing under the act of Assembly, its incidental operation in augmenting the receipts into the city treasury cannot invalidate it.

The like principle based upon legislative authority to impose a license tax was affirmed in the recent cases of *Western Union Telegraph Company* and *Mutual Union Telegraph Company v. City of Philadelphia*, 22 Weekly Notes, page 39. The question in both cases was not upon the authority to levy, but the reasonableness of the license fee.

The present case rests upon a denial of authority to impose the license tax.

Under the general borough laws of 1851, as well as under the act of May 1, 1876, we are unable to find any authority vesting in plaintiffs the right to impose the license tax required by councils in the fifth section of the ordinance.

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It follows upon principle and authority that the fifth section of said ordinance was passed by councils without authority of law, and therefore is inoperative and void.

The fourth section of the act of May 1, 1876, provides :
“ That cities of the first class shall be exempt from the provisions of this act.”

Defendant's counsel, therefore, contends that this section offends against article 3, section 7, of the Constitution of this State in reference to local or special legislation, and it is therefore void.

It is not necessary in our view of the law of this case to discuss the constitutional question thus raised. There are two lines of authorities which apparently conflict. In *Davis v. Clark*, 10 Out., 377, the court says in reference to the legislation called in question in that case : “ It is not then a general act applicable to every part of the Commonwealth. It did not apply to a great number of counties, but there is no dividing line between a local and a general statute. It must be either one or the other. If it apply to the whole State, it is general ; if to a part only, it is local. As a legal principle, it is as effectually local when it applies to sixty-five counties out of the sixty-seven, as if it applied to one only. The exclusion of a single county from the operation of this act makes it local. This line of cases is continued down to *Weinman v. Passenger Railway*, 3 Crumrine, 192.

On the other hand, there is a well-marked distinction between local and general acts declared in the case of *Wheeler v. Philadelphia*, 27 P. F. S. 338. It is there held that a statute relating to persons or things as a class is a general law ; one relating to particular persons or things of a class is special. Section 7, article 3, of the Constitution of 1874, prohibiting local or special legislation, does not prevent classification of municipal corporations with reference to taxation ; and the act of May 23, 1874, classifying cities according to their population, is constitutional.

Justice PAXSON, delivering the opinion of the court, says

the necessity for classification is recognized in the Constitution itself.

After giving instances thereof, the court say if the classification of cities is in violation of the Constitution, it follows of necessity, that Philadelphia, as a city of the first class, must be denied the legislation necessary to its present prosperity and future development, or that the small inland cities must be burdened with legislation wholly unsuited to their needs.

For if the Constitution means what the complainants aver that it does, Philadelphia can have no legislation that is not common to all other cities of the State; and for this there is absolutely no remedy but a change in the organic law itself. This case has been frequently approved by the Supreme Court in subsequent cases, among them *Kilgore v. Magee*, 4 Nor. 401; *McCarthy v. Commonwealth*, 14 Out. 246.

Legislation which might be well suited to municipal divisions in the State at large would be inapplicable to cities of the first class; and legislation appropriate and suitable to these would be burdensome to other municipalities in the Commonwealth. Is there no remedy for this? *Wheeler v. Philadelphia* gives a true guide, based upon the classification of cities authorized by the Constitution itself and by the necessity for legislation appropriate to such classification.

Applying this principle to the act of 1876, we discover that it relates to all the cities and municipalities of the State, except cities of the first class; as to these, the Legislature evidently considered the act inapplicable. The exception was made, not of any particular persons but of an entire class, from the very necessity of the case.

We avoid any further discussion of this question because it is not necessary to a decision of the case. For the reason given it is our duty to enter judgment in the case stated for the defendant.

Lancaster v. Illuminating Co.

NOTE.—I do not find that this case has been reversed. The position here taken seems, however, to be at variance with the doctrine of other cases in the same State, as indicated by the following language used in *Lancaster v. Edison Elec. Illum. Co.*, *post*.

“In view of the numerous decisions in like cases, it cannot be doubted or denied that a municipality may properly impose a reasonable license fee upon the poles maintained in the streets by telephone companies, electric light companies, &c.”

See also the two preceding cases, and note to *City of New Orleans v. Gt. So. Teleph. & Tel. Co.*, *post*, p. 122.

LANCASTER v. EDISON ELECTRIC ILLUMINATING COMPANY.

Lancaster Co., Pa., Common Pleas, Nov., 1888.

(8 Pa. Co. Ct. R. 178.)

ELECTRIC LIGHTING COMPANY.—LICENSE TAX.

A municipal corporation has a right to impose a reasonable tax upon an electric light company, although it pays state taxes upon both capital stock and gross receipts.

Held, that fifty cents per pole was not an unreasonable license tax to impose upon a corporation having a capital stock of \$135,000, and doing a dividend paying business.

The ordinance which provided for the license fee also required each company owning poles to mark them in a specified way. The defendant, denying the right of the city to enact the ordinance, refused to mark its poles, and as many separate actions as it had poles were brought against it, to recover in each case the penalty of five dollars fixed by the statute “for each offense.”

Held, that there was but a single offense, and only a single penalty could be recovered.

Case of this series cited in opinion: *W. U. Tel. Co. v. Philadelphia*, *ante*, p. 98.

ACTION for penalties. Facts stated in opinion.

W. T. Brown, city solicitor, for plaintiff.

George M. Kline and *D. McMullen*, for defendants.

Lancaster v. Illuminating Co.

LIVINGSTON, P. J.: April 19th, 1890—By the case stated, it appears that the defendant is a corporation, chartered March 1, 1886, by virtue of the act of April 29, 1874, and its supplements, for the purpose of manufacturing, distributing and supplying electricity for lighting, heating, motive power, and all other purposes for which electricity can or may be used, to the citizens of Lancaster, Pa., and, for such purposes, entitled to have and enjoy all the rights and privileges granted and conferred by said acts.

That, by permission and consent of the city of Lancaster, given in and by resolution of March 3, 1886, the defendant, said company, has erected and is now maintaining sundry lines of poles and wires in and along streets, alleys and highways of said city for distributing and supplying electricity to its patrons, according to its corporate powers, the average cost of erecting said poles being \$3 per pole.

That defendant is a stock company, having a capital stock of \$135,000, divided into 2,700 shares, each of the par value of \$50.

That its revenue exceeds its expenses, and it pays dividends to its stockholders.

That said poles and wires are a part of the capital stock of the corporation, and are wholly included in the same, and as such pay to the Commonwealth a statute tax of one-half mill upon the capital stock for each one per centum of dividend made, as well as the State tax of eight mills on each dollar of gross receipts, provided for by section 23 of the act of June 1, 1889.

That the councils of the city of Lancaster passed an ordinance which was approved on March 17, 1887, for the levy and collection of a "license tax," within the city of Lancaster, for street purposes.

Section 2 of which provides :

"That all telegraph, telephone and electric light poles, now erected or hereafter to be erected in the city of Lancaster, which are or shall be owned by any corporation, firm or individual, shall be designated by the

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the corporation and included in it, and the tax it pays to the Commonwealth.

The city having, as we have stated, the right to make proper police regulations (*Johnson v. Phila.*, 30 Pa. 445; 97 Mass. 221), and the ordinance being a police regulation, the license fee therein specified is presumed to be a reasonable regulation, and the burden is upon the defendant to prove or show it to be unreasonable.

In *Western Union Telegraph Co. v. Phila.*, 22 W. N. C. 39; S. C., 11 Cent. R. 192, in which the municipality, by ordinance, imposed a license fee of \$1 per annum on each pole, and of \$2.50 per annum on each mile of suspended wire within its limits—the facts were found by a referee—the court declined to rule that the fees so charged were so obviously excessive and unjust as to authorize a revision of the action of councils, and the Supreme Court affirmed the ruling of the court below.

From the facts presented, we are of the opinion that the license fee of fifty cents per annum for each and every pole, as stated in the ordinance, is not an unreasonable license fee.

3. Is the company, defendant, liable to pay a separate and distinct penalty for each and every pole that it failed or neglected to so mark and number, and apply for a license to maintain?

Section 2 of the ordinance, after providing for marking and designating the poles by painting, etc., declares it to be the duty of every such owner or owners, on or before the 1st day of April next, and annually thereafter, to make application to the mayor for a license to maintain the poles heretofore erected for the ensuing year, specifying the poles so to be maintained by their designation, as provided for in this section, and the mayor shall issue a license to such applicant, who shall authorize the maintenance of the poles designated in such application only for the period of one year, to be computed from the 1st day of April of each year, and no longer. And the charge for the issuing of such license shall be the sum of fifty cents for each and

every pole authorized to be maintained thereby, to be paid to the city treasurer for the use of the city. This section fixes no penalty.

For the penalty or penalties, for any and all violations, we are referred to section 4 of the ordinance. What does it declare? "That any person failing to take out a license," any person refusing to pay the license tax required by this ordinance, any person who shall violate any of the provisions of any section of the ordinance, shall subject the offender, in addition to the immediate forfeiture of his license, to a penalty of \$5 for each and every offense, to be sued for and recovered in the manner that debts for penalties of like amount are by law sued for and recovered. Under this ordinance the defendant is not required to take out a license separately for each pole. In its application, it may designate and include every pole it has erected and desires to maintain in this city; and a refusal to do so and take out such a license, paying fifty cents license for each pole, constitutes one offense, and subjects the offender to forfeiture of license and a penalty of \$5. So, a failure to designate and mark its poles, as designated, constitutes one offense, and subjects it to a penalty of \$5 and forfeiture. So of any other violation of the ordinance.

But in order to enable the defendant to make application for a license and pay the license fee, it will be necessary to have the poles designated and specified as the ordinance requires; the negligence or refusal so to do constitutes a part of the offense of failure, neglect or refusal to apply for and take out a license and paying therefor a license fee of fifty cents for each pole. Of this offense, and for this penalty, the defendant is undoubtedly guilty and liable, as appears by the terms of the case stated, but it is not liable under the ordinance or facts in the case stated for a penalty of \$5 for failing to designate each pole, and take out a separate license for each pole; that is not one of the requirements of the ordinance.

Being of opinion that the city of Lancaster possessed the power to levy and collect a reasonable license fee upon the

the corporation and included in it, and the tax it pays to the Commonwealth.

The city having, as we have stated, the right to make proper police regulations (*Johnson v. Phila.*, 30 Pa. 445; 97 Mass. 221), and the ordinance being a police regulation, the license fee therein specified is presumed to be a reasonable regulation, and the burden is upon the defendant to prove or show it to be unreasonable.

In *Western Union Telegraph Co. v. Phila.*, 22 W. N. C. 39; S. C., 11 Cent. R. 192, in which the municipality, by ordinance, imposed a license fee of \$1 per annum on each pole, and of \$2.50 per annum on each mile of suspended wire within its limits—the facts were found by a referee—the court declined to rule that the fees so charged were so obviously excessive and unjust as to authorize a revision of the action of councils, and the Supreme Court affirmed the ruling of the court below.

From the facts presented, we are of the opinion that the license fee of fifty cents per annum for each and every pole, as stated in the ordinance, is not an unreasonable license fee.

3. Is the company, defendant, liable to pay a separate and distinct penalty for each and every pole that it failed or neglected to so mark and number, and apply for a license to maintain?

Section 2 of the ordinance, after providing for marking and designating the poles by painting, etc., declares it to be the duty of every such owner or owners, on or before the 1st day of April next, and annually thereafter, to make application to the mayor for a license to maintain the poles heretofore erected for the ensuing year, specifying the poles so to be maintained by their designation, as provided for in this section, and the mayor shall issue a license to such applicant, who shall authorize the maintenance of the poles designated in such application only for the period of one year, to be computed from the 1st day of April of each year, and no longer. And the charge for the issuing of such license shall be the sum of fifty cents for each and

every pole authorized to be maintained thereby, to be paid to the city treasurer for the use of the city. This section fixes no penalty.

For the penalty or penalties, for any and all violations, we are referred to section 4 of the ordinance. What does it declare? "That any person failing to take out a license," any person refusing to pay the license tax required by this ordinance, any person who shall violate any of the provisions of any section of the ordinance, shall subject the offender, in addition to the immediate forfeiture of his license, to a penalty of \$5 for each and every offense, to be sued for and recovered in the manner that debts for penalties of like amount are by law sued for and recovered. Under this ordinance the defendant is not required to take out a license separately for each pole. In its application, it may designate and include every pole it has erected and desires to maintain in this city; and a refusal to do so and take out such a license, paying fifty cents license for each pole, constitutes one offense, and subjects the offender to forfeiture of license and a penalty of \$5. So, a failure to designate and mark its poles, as designated, constitutes one offense, and subjects it to a penalty of \$5 and forfeiture. So of any other violation of the ordinance.

But in order to enable the defendant to make application for a license and pay the license fee, it will be necessary to have the poles designated and specified as the ordinance requires; the negligence or refusal so to do constitutes a part of the offense of failure, neglect or refusal to apply for and take out a license and paying therefor a license fee of fifty cents for each pole. Of this offense, and for this penalty, the defendant is undoubtedly guilty and liable, as appears by the terms of the case stated, but it is not liable under the ordinance or facts in the case stated for a penalty of \$5 for failing to designate each pole, and take out a separate license for each pole; that is not one of the requirements of the ordinance.

Being of opinion that the city of Lancaster possessed the power to levy and collect a reasonable license fee upon the

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poles mentioned in the case stated, that the ordinance is valid, that the license fee fixed is not unreasonable, and that the defendant is guilty of but one violation of said ordinance, and liable for but one penalty for such violation, we enter judgment for the plaintiff in accordance with the terms of the case stated, for \$5, with costs of suit, in the suit of Nov. T., 1888, No. 45; and in the remaining cases, up to and including Nov. T., 1888, No. 74, we enter judgment for the defendant.

NOTE.—See note to *New Orleans v. Great So. Teleph. and Tel. Co.*, *post*

THE CITY OF NEW ORLEANS v. THE GREAT SOUTHERN
TELEPHONE AND TELEGRAPH COMPANY.

Louisiana Supreme Court, Feb. 13, 1888.

(40 La. An. 41.)

TELEPHONE LINES.—CONTRACT.—TAXATION.—CONSTITUTIONAL LAW.

(Head note by the court):

An annual charge of five dollars per pole upon the poles of a telephone company already established, imposed by a municipal ordinance as a “consideration for the privilege,” is not a tax, either on property or as a license, and cannot be sustained as an exercise of the taxing power.

It is not an exercise of the police power, as it involves no consideration of public order, health, morals or convenience.

A municipal ordinance granting to a particular company authority to construct and maintain telephone lines on the streets, without any limitation as to time, and for a consideration stipulated, when accepted and acted on by the grantee by a compliance with all its conditions and the construction of a valuable and expensive plant, acquires thereby the features of a contract, which the city cannot thereafter abolish or alter in its essential terms, without the consent of the grantee. The imposition of new and burdensome considerations is a violation thereof.

A proviso in the ordinance to the effect that “the *acts* and *doings* of the company *under* this ordinance shall be subject to any ordinance or ordinances that may be hereafter passed by the city,” does not convert

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the grant into a more revocable permit. On the contrary, it assumes that the ordinance is to continue in full force and effect, and recognizes the right of the grantee to do and to act under and in accordance with it, and only subjects "such acts and doings" to future municipal regulations not inconsistent with the ordinance itself.

APPEAL from the Civil District Court for the parish of Orleans ; VOORHIES, J.

. Action to compel payment of tax imposed by the city upon the telephone company of \$5 per pole.

Walter H. Rogers, city attorney, and *Branch K. Miller*, assistant city attorney, for plaintiff and appellant.

Bayne, Denegre & Bayne, for defendant and appellee.

The opinion of the court was delivered by FENNER, J.: The defendant is the assignee and successor of the New Orleans Telephonic Exchange, referred to in the following ordinance of the city of New Orleans, adopted February 18, 1879 :

An ordinance authorizing the construction and maintenance of a telephonic telegraph line through the streets of the city of New Orleans.

Section 1. Be it ordained by the City Council of the city of New Orleans, that the New Orleans Telephonic Exchange is hereby authorized to construct and maintain a line or lines of telegraph through the streets of this city ; the line or lines to be constructed along such streets, at such points, and in such manner, as to the kind and position of the telegraph poles, the height of the wires above the streets, and in all other particulars, as the administrator of the department of improvements of this city may direct.

Provided, however, that the said company shall connect their wires with the mayor's office, chief of police's office, and fire alarm and telegraph office, and place and keep telephones therein free of charge to the city, so that said telephones may be used in connection with all wires under the control of said company,

Sec. 2. And be it further ordained, etc. That all the acts and doings of said company under this ordinance shall be subject to any ordinance or ordinances that may hereafter be passed by the City Council concerning the same.

Under this ordinance defendant constructed, and has since maintained, telephonic lines through the streets, built according to the directions of the Administrator of Improvements, and with his approval, and has furnished the city with the free telephonic service stipulated, and has complied in all respects with the terms of the ordinance.

The plant established by defendant is expensive and valuable. The defendant pays a tax upon this plant as property, and also pays a license tax levied on his business.

In April, 1880, the General Assembly of the State passed Act No. 124, authorizing corporations formed for the purpose of transmitting intelligence by magnetic telegraph or telephone, to

“Construct and maintain telegraph, telephone, and other lines along all State, parish or public roads or public works, and along and parallel to any of the railroads in the State, and along and over the waters of the State; provided that the ordinary use of such roads, works, railroads, and waters be not thereby obstructed, *and along the streets of any city, with the consent of the council or trustees thereof.*”

The defendant having the prior consent of the city, certainly came under the protection of this act as to the maintenance of its lines from the date of its passage.

In December, 1883, the city council passed an ordinance to regulate and control the erection and maintenance of poles for supporting wires of the telephones within and on the streets, ways, and public places of the city of New Orleans, containing various provisions on the general subject, with none of which we have any present concern, except the following: That “no poles shall be allowed to be erected, *or any existing poles be allowed to remain*, in that portion of the city embraced by Jackson street, Elysian Fields, Roman street, and the Mississippi river, *except upon the payment of \$5 per annum per pole for every such pole erected or at present in use* within that section of the city; * * * said payments to be *in consideration of the privilege and advantage of entering upon, using and permanently occupying the streets, ways and places of*

the city for private property, and to be paid annually in advance, commencing January 1, 1884.

Defendant had 600 poles within the section designated, on which the sum of \$3,000 is claimed to be due, and the object of the present action is to enjoin defendant from using or maintaining said poles for telephonic purposes until payment thereof be made.

It is not pretended that the exaction claimed is a tax, either on property or as a license, or that it is an exercise of the taxing powers in any respect.

The ordinance qualifies it as a price or consideration for the privileges enjoyed. It is not even alleged that defendant has ever consented or contracted to pay such consideration, and the attempt made to prove such consent was not only *ultra petitionem*, but the evidence offered for the purpose was manifestly insufficient and illegal, and was properly rejected.

There is, therefore, entire absence of any legal tie binding the defendant as a debtor for the amount claimed, and, if the city were suing simply for a money judgment, the petition would set forth no cause of action.

The real relief claimed by the city, however, is found in the injunction prayed for, based on the theory that the provision of the ordinance referred to is a regulation or condition imposed upon the maintenance of the poles and exercise of the privileges which the city had the right to impose, and without compliance with which the defendant could not lawfully continue to maintain and exercise them.

The question for our determination is whether the city had the right to make such a regulation or impose such condition.

It is not seriously contended that the provision is a police regulation ; and, indeed, such contention is silenced, not only by the nature, but by the express terms of the provision itself, which qualify the exaction as a "consideration for the privilege." No consideration whatever of public morals, health or convenience is involved. It is not proposed to abolish the use of poles or to alter their

location, construction or manner of use, in any way, to subserve the public comfort. The simple requirement is the payment of a price, on payment of which the *status quo* continues; while, without such payment, it must cease. The case presents no feature of an exercise of the police power.

The only remaining question is, whether, after granting the defendant authority to construct and to maintain its lines, without limitation as to time, and with no other consideration than the furnishing of certain free telephonic facilities to the city; after the defendant has, at great expense, established its plant and constructed its lines, and when it has fully complied with all the conditions imposed, the city can now exact this large additional consideration for the continued enjoyment of privileges already granted.

If the city can do this now, she could have done it the very day after the defendant had completed its lines, when it had incurred all the expense, and before it had reaped a particle of return. If she can impose a charge of five dollars per pole, she can, with equal power, impose one of \$1,000, and, for that matter, she could arbitrarily revoke the grant at her pleasure.

Either she is bound, according to the terms of her proposition accepted and acted on by defendant, or she is not bound at all.

Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant, when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside or to interpolate new or more onerous considerations therein. Such has been the well recognized doctrine of the authorities since the *Dartmouth College Case*, 4 Wheat. 518.

The main contention of the city, however, is that the second section of the ordinance robs it of the features of a contract, and converts the authority granted into a mere revocable permit. The section is as follows: "That all the *acts and doings* of said company *under* this ordinance shall be subject to any ordinance or ordinances that may

hereafter be passed by the City Council concerning the same.”

The city's construction of this section is strained and unreasonable, and conforms neither to its spirit or letter.

It is not conceivable that the grantee would have invested its means in such an enterprise, had it imagined that the terms and conditions of its enjoyment of the privilege lay at the entire mercy of the city. If such unreasonable intention lurked in the minds of the council which passed the ordinance, the grantor, under familiar rules of construction, came under the obligation of expressing it clearly and unambiguously.

But what is it that is subject to regulations and control by future ordinances?

It is “*the acts and doings of said company under this ordinance.*” This assumes that the ordinance itself is to continue in full force and effect, and certainly reserves no power to repeal, destroy, or alter it in any of its essential features and considerations. It recognizes the right of the company to act and to do under and according to the ordinance, only subjecting such “acts and doings” to municipal regulations not conflicting with the ordinance itself.

We consider that the imposition of the additional and burdensome consideration here involved is not within the scope of the rights reserved.

Judgment affirmed.

NOTE.—In this case the question of the power of a municipality to impose a tax, or a license fee, by virtue of its police power, was not decided; for the charge imposed was specifically as a consideration for privileges already enjoyed; and the main point decided was that such a burden could not be added after the company had been authorized to construct and maintain its lines in the streets, without any consideration being demanded, and had accepted and acted upon said authorization.

This and the four preceding cases relate to the right of municipal corporations to impose a charge upon electrical companies using the streets.

In addition to these, see the following cases in volume 1 of this series: *W. U. Tel. Co. v. Richmond*, p. 149; *Wisconsin Tel. Co. v. Oshkosh*, p. 687.

THE STATE, EX REL. BELL TELEPHONE COMPANY, Respondent, v. HENRY FLAD, ET AL., Appellants.

St. Louis Court of Appeals, October 26, 1886.

(23 Mo. App. 185.)

TELEPHONE POLES IN STREETS.—MUNICIPAL CONTROL.—MANDAMUS.

The board of public improvements, a ministerial board of the city of St. Louis, having no legislative power further than to make regulations for its own business and government, not inconsistent with the ordinances of the city, undertook, without authority of the city, to impose upon a telephone company (which had by law the right to erect poles and string wires in streets, subject only to the power of the city to designate the location and kind of poles and height of wires), as conditions of permission to erect poles, (1) that it would permit other companies requiring electric wires to string them upon its poles, at a fixed rental, and (2) that it would maintain on its poles no more wires than were necessary for its business.

Held, that it had no such power; and as the refusal of the company to accept such conditions was made the sole ground for refusing the permits, held that a judgment awarding a peremptory writ of mandamus was proper.

APPEAL from judgment of St. Louis Circuit Court, sustaining demurrer to return to writ of mandamus and ordering a permanent writ to issue.

Leverett Bell, for the appellants.

Hitchcock, Madill & Finkelnburg, for the respondent.

THOMPSON, J., delivered the opinion of the court:

This is a proceeding by mandamus to compel the board of public improvements of the city of St. Louis to grant a permit, or permits, for erecting telephone poles upon certain streets and alleys in the city of St. Louis, in accordance

with the provisions of an ordinance of the city numbered 11,604, by which the subject is regulated. A demurrer to the return was sustained by the Circuit Court, and the defendants declining to plead further, peremptory writ was ordered to issue.

The question for decision, therefore, arises upon the legal sufficiency of the return, and it is this: Whether the board of public improvements have the power to oblige a corporation formed under the laws of this State (under article 5, chapter 21, of the Revised Statutes, relating to the incorporation of telegraph and telephone companies), which may desire to erect telephone poles and establish telephone wires in the city of St. Louis, to enter into a stipulation,

(1) "To grant to any other company requiring electric wires for its business, the right to use one or more cross-bars of its poles at an annual rent of forty cents for half a cross-bar, and sixty cents for a full cross-bar, except in cases where the party asking for room on another company's poles is itself charging that company a higher rent per cross-bar on its own poles heretofore erected, in which case an equal rental may be demanded for wires on poles erected under these rules."

And also

(2) "That it will not place any more wires or cables on its own poles, or on the poles of other companies, than are actually necessary for its business, and that it will promptly remove any unused wires from the poles."

The refusal of the relator to file its acceptance in writing of these conditions is, the return shows, the sole reason why the board refuses to grant the permit or permits prayed for.

The question is one of extreme simplicity. By section 879 of the Revised Statutes, it is provided as follows:

"Companies organized under the provisions of this article, for the purpose of constructing and maintaining telephone or magnetic telegraph lines, are authorized to set their poles, piers, abutments, wires and other fixtures, along and across any of the public roads, streets and waters of this State, in such a manner as not to incommode the public in the use of such roads, streets and waters."

The only limitation imposed by the Legislature upon this privilege relating to the use of the streets and alleys of cities and towns for telephone posts is embodied in section 888 of the Revised Statutes, which is in the following language:

“The mayor and aldermen, or board of common council of any city, and the trustees of any incorporated town, through which the lines of any telephone and telegraph company are to pass, may, by ordinance, or otherwise, specify where the posts, piers or abutments shall be located, the kind of posts that shall be used, the height at which the wires shall be run; and such company shall be governed by the regulations thus prescribed; and after the erection of said telephone or telegraph lines, the said mayor and aldermen, or board of common council, and the trustees of any incorporated town, shall have power to direct any alteration in the location or direction of said posts, piers or abutments, and also in the height at which the wires shall run, having first given such company or its agents opportunity to be heard in regard to such alteration.”

It will be seen that this limitation relates exclusively to three subjects: 1. The *place where* the posts, piers or abutments shall be located. 2. The *kind* of posts that shall be used. 3. The *height* at which the wires shall be run.

Whether any power exists in the city of St. Louis under the provisions of its peculiar charter, which emanates from the Constitution, and not from the Legislature, to impose any additional restrictions, we shall not inquire, because the question does not arise upon this record. The pleadings disclose that the city has not attempted to exercise any such power, to which objection is made by the relators, although the board of public improvements has.

The board of public improvements is, as the return shows, a ministerial board of the city of St. Louis, whose duties, by the terms of the charter, are to be specified by ordinance. It also shows that the board has been empowered by ordinance to make such laws and regulations for its business and government, not inconsistent with the ordinances of the city, as it shall deem expedient. But this is merely the grant of a power to make by-laws and rules for the transaction of its own business as a board, and mani-

festly confers upon it no power to establish such regulations in respect of telephone companies as the ones in question.

The power, if it exists, must then be sought in other ordinances, and none has been pleaded which undertakes to confer it. Ordinance number 11,604, which is set out in the return, nowhere undertakes to confer the power to impose such regulations. Its provisions have been accepted by the relators, and no objection is made to them. Ordinances 11,976 and 12,723, by their terms, regulate the placing of wires, tubes or cables conveying electricity for the production of *light* or *power* along the streets, alleys and public places of the city of St. Louis, and manifestly were not intended to have any application to the subject of telephone poles or wires. The provisions of ordinance number 12,724, relating to telephone companies, have been accepted by the relator, and contain nothing which is pertinent to the question. Ordinance 12,733 relates merely to the license tax required to be paid by telephone companies, and, although set out in the return, is likewise irrelevant.

These are all the sources of power set up in the return, and, as they manifestly do not confer upon the board of public improvements the power to establish the regulations complained of, it must be concluded that no such power exists. As no power exists on the part of the board to impose these restrictions, the inquiry whether they are reasonable or unreasonable is totally irrelevant.

Nor is the argument that the relator, in accepting these regulations, entered into a binding contract with the city to abide by them, which it had not the power subsequently to withdraw, at all tenable. As the board of public improvements, in imposing these regulations, were not acting in pursuance of any power vested in them by charter or ordinance, they were not acting as agents of the city. An acceptance of these conditions by the relator, if otherwise sufficient to create a contract, would not, therefore, create a contract between it and the city. Moreover, the city is not, as the Supreme Court necessarily held when it remanded the cause to us for decision, after we had transferred it

thence, a party to this proceeding, and is not claiming any rights against the relator, by contract or otherwise.

It is not worth while to argue the question that an agreement by the relators to abide by conditions which the board of public improvements had no power to annex to the privilege granted to the relator by the Legislature, would not conclude it from a subsequent withdrawal of their agreement, especially where the city, in the meantime, had done no act, or in any way changed position on the faith of such agreement so as to be prejudiced by its withdrawal.

The case then, nakedly, stands thus: The Legislature has granted to this relator the privilege of erecting its posts and wires in the streets of the city of St. Louis, subject to the power of the city to impose the three conditions above named. The city has not, by ordinance, attempted to impose any other conditions which are objected to, nor has it empowered the board of public improvements to do so. Nevertheless the board—its members, no doubt, acting conscientiously, and with the faithful purpose of promoting the public interests—have attempted, of their own motion, to impose the two additional restrictions above set out, and to require the relator to accept the same before granting to it a permit, or permits, to erect its poles and wires upon the streets and alleys named. This they could not do. And as they have made the refusal of the relator to accept these conditions the sole ground of their refusal to grant the permit or permits prayed for, it is a case where the legal right of the relator is clear; and, therefore, the judgment of the Circuit Court sustaining the demurrer to the return, and awarding a peremptory writ of mandamus, must be affirmed. All the judges concur.

NOTE.—This case is cited in *City of Hannibal v. Mo. & Kan. Teleph. Co.*, *post*.

See note to *Grand Rapids Elec. Lt. & Power Co. v. G. R. E. L. & Fuel Gas Co.*, *post*.

THE STATE, THE HUDSON TELEPHONE COMPANY, Prosecu-
tor, v. THE MAYOR AND ALDERMEN OF JERSEY CITY.

New Jersey Supreme Court, Feb. 17, 1887.

(49 N. J. L. 303.)

MUNICIPAL CONTROL OF POLES AND WIRES.

(Head note by the court):

A common council cannot revoke a designation of the streets in which a telegraph company may place their poles, given under the provisions of the eighth section of "an act to incorporate and regulate telegraph companies" (Rev. 1174), when the company has conformed to the conditions upon which the designation was made, and has expended money in placing poles upon the designated streets.

THIS writ brings up an ordinance to repeal an ordinance entitled "An ordinance to authorize the Hudson Telephone Company to erect posts or poles in certain streets of Jersey City."

Vredenburg & Garretson, for plaintiffs

R. B. Seymour, for defendants.

The opinion of the court was delivered by REED, J.:

The prosecutors are a corporation by reason of a certificate filed under the provisions of an act entitled "An act to incorporate and regulate telegraph companies," contained in the *Rev.*, p. 1174, and the supplement thereto to be found in the *Pamph. L.* 1881, p. 201.

The eighth section of the original act is as follows:

"Any telegraph company organized by virtue of this act shall have full power to use the public roads or highways in the State, on the line of their route, for the purposes of erecting posts or poles on the same to suspend

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wires and other fixtures, upon first obtaining consent, in writing, of the owner of the soil ; provided, however, no poles or poles shall be erected on any street of any incorporated city or town without first obtaining from the incorporated city or town a designation of the streets in which the same shall be placed, and the manner of placing the same."

In accordance with these provisions an ordinance was passed by the common council of Jersey City, and approved by the mayor, April 1, 1884. The ordinance gave the company permission to erect posts and poles, and to lay an underground cable in certain streets, or portions of several streets. It contained conditions that no post should be erected in front of any building so as to interfere with the approach to the entrance of said building, nor without the permission of the property owner ; that the company should conform to provisions of an ordinance concerning telegraph poles in the public street ; that they should not interfere with gas, water, or sewer pipes ; and that, before they commenced to excavate for the purpose of laying cable, they should give a bond conditioned that the company would comply with all the conditions named in the ordinance, and save the city harmless from such acts as might injure third persons. These are, briefly stated, some of the conditions contained in the said ordinance.

It appears from the evidence taken in the cause that the company proceeded to place poles along the route marked out by the ordinance. They had placed from 35 to 45 poles at an expense of about \$10 a pole, and had expended other moneys in and about the erection of the poles.

Then was passed the ordinance brought up before us, which repeals the ordinance which confers permission to place the poles as above mentioned.

I am of the opinion that, as a general rule, a designation of streets by a city gives the company an irrevocable right to use the streets so designated for the purposes indicated in the statute. Certainly, after the expenditure of money in the erection of poles made in reliance upon the municipal designation, the company obtains a vested right, of

which they cannot be stripped by a subsequent revocation of such designation.

The notion that a corporation which, under provisions similar to the present act, has, upon the strength of a permission to use a certain route, spent thousands of dollars in laying railway tracks or subterranean cables, or in erecting posts and stretching wires, is at the mercy of the city authorities continually and entirely, is not to be entertained for a moment.

A view that the rights of the corporation are of so unsubstantial a character is opposed to all judicial sentiment, from the *Dartmouth College Case* to the present time. *State, Briton, Pros. v. Blake*, 6 Vroom. 208, and cases cited on page 215.

The power to repeal, suspend, and alter charters contained in section 6 of the act concerning corporations (Rev. p. 178), does not reach the exercise of the authority attempted by the common council. No provision is contained in the act under which the prosecutors were incorporated which confers upon a municipality the power to revoke a permission once granted. The grant of the franchise to this company was subject only to a repeal or alteration by the Legislature, and when that corporation had acquired vested rights in the mode designated by their charter, it certainly was not in the power of a common council to strip them of any right so acquired.

It was undoubtedly competent for the common council to couple with the permission such reasonable conditions as the occupancy of a public street by a telephone company's posts and wires would suggest. And without such conditions the erection and maintenance of appliances of the business of the company would be subject to the reasonable control of municipal by-laws. *Dillon on Mun. Corp.* §§ 555, 558, 575.

But that the common council has the power, at its mere will, to annul the act which has legalized the occupation of the streets, and so to leave the company's property impressed with the character of a nuisance which can be at

once abated, and their business thus destroyed, I cannot admit.

The power of the common council to revoke its permission given, by statutory authority, to the location of a railroad in the streets of a city, was expressly denied in the case of the *People's Passenger Railway Co. v. Baldwin*, reported in 37 Leg. Int. 424, and in the case of the *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 358.

I also understand that the rule laid down in *Commonwealth v. Boston*, 97 Mass. 555, in reference to the right of municipal authorities to proceed against telegraph poles in a street as nuisances, after permission to so place them has once been granted, is in the same direction.

It is noticeable that there was no failure, in the present case, by the company to perform any required condition precedent to their occupation of the streets. The bond which they were to give was only to protect the city in case the company should excavate and lay cable wires, which, if they could, under their charter, do at all, they have not done. There is no pretension that they failed in any other particular to conform to the requirements embodied in the ordinance conferring the permission.

The power to repeal the present ordinance is also claimed to exist under the authority over streets, as well as the power to repeal ordinances conferred upon the common council of Jersey City by its charter. But it is clear that the power to remove obstructions from streets is confined to nuisances, and any object which has a legal right in the street is beyond the power of the common council. So long as the company violate no reasonable regulation of the common council, their property has as much right in the streets as vehicles and street cars.

And, in respect to the power to repeal ordinances, it is a general power, which exists outside of the express powers conferred by charter by reason of the right to pass ordinances. This general power cannot be invoked to sustain the rescission of an act done by virtue of other legislation,

which act is, by reason of the object, the latter legislation, or by the acquisition of vested rights, an exception to the general rule which permits legislative bodies to rescind resolutions or repeal laws.

We have determined that this act of giving permission (which, by the by, could have been conferred by resolution as well as by ordinance) was one which, at least, after acceptance and expenditure of money under it, was irrevocable. It was therefore removed from the operation of the general rule.

It is further suggested, rather than urged, in favor of the repealing ordinance, that the prosecutors were enjoined, previous to the passage of this ordinance, from proceeding further in using their telephone.

Without stopping to decide to what extent a permanent inability on the part of the company to pursue the business for the transaction of which it was incorporated would justify the city in compelling the removal of its poles and wires, it is enough, now, to remark that there is nothing before us to show the character of the injunction orders of the court. There is no legal evidence even of the existence of an injunction, much less of the scope or permanent character of the prohibition.

I am of the opinion that the ordinance brought up should be adjudged illegal. Let it be set aside.

NOTE.—See note to *Grand Rapids Elec. Lt. &c., Co. v. G. R. E. L. & Fuel Gas Co., post.*

THE NEW YORK AND NEW JERSEY TELEPHONE COMPANY
v. THE INHABITANTS OF THE TOWNSHIP OF EAST ORANGE,
IN THE COUNTY OF ESSEX.

Court of Chancery of New Jersey, Feb. 24, 1887.

(42 N. J. Eq. 490.)

TELEPHONE POLES.—MUNICIPAL CONTROL.—INJUNCTION.

A telephone company is forbidden by statute in New Jersey to erect poles in the streets of incorporated towns without first obtaining from the municipal authorities direction as to the location and manner of erection. There being doubt as to whether the defendant was an incorporated town, and so as to whether said statute would apply, *held*, that the authorities would not be restrained by preliminary injunction from removing telephone poles erected without designation.

BILL for injunction on order to show cause. On bill and answer.

J. M. C. Morrow and *M. Egleston*, for complainants.

A. P. Condit and *H. Wallis*, for defendants.

THE CHANCELLOR: The controversy between the parties in this case is in reference to the right of the township authorities to remove poles for telephone wires set by the complainants on Park avenue, in the township. The complainants allege that they have succeeded, by assignment from the Bell Telephone Company, to a right granted by the Essex public road board to that company, by agreement in writing, to set the poles, and that they themselves have directly received such permission (but verbally only) from that board. The complainants claim, that being duly incorporated under the laws of this State, they have legislative authority, under

the "act to incorporate and regulate telegraph companies" (*Rev. p. 1174*, and the supplement thereto, *P. L. of 1880, p. 201*,) to erect the poles. This suit was brought to enjoin the township authorities from removing the poles, as they had threatened to do. The township authorities insist that the township is an "incorporated town," within the meaning of the act and supplement just mentioned, by the former of which it is provided that no posts or poles shall be erected in any street of any incorporated city or town without first obtaining from such city or town a designation of the streets in which they shall be placed, and the manner of placing them, &c., and the latter provides that it shall be the duty of the municipal authorities of any such incorporated city or town to make such designation on the application of the company. The supplement does not give to the company the right to erect the poles without the designation which is made a prerequisite in the original act, but merely provides that the municipal authorities shall make the designation upon application. The designation is still a prerequisite. The complainants, therefore, if the township is an incorporated town, not only have no statutory authority to erect the poles, but are absolutely forbidden by the act to erect them without the designation; and any permission obtained from the road board cannot obviate the necessity of obtaining the designation. So that, if the defendants' claim is well founded, the complainants, instead of having legislative authority to set the poles, have set them in Park avenue in defiance of the legislative prohibition. Under such circumstances it cannot be claimed that they are entitled to the protection of this court to keep them there.

But the complainants' counsel insist that the township is not an incorporated town. From an examination of the various special acts conferring municipal powers upon the defendants, it appears that they are possessed of many such powers beyond those conferred upon ordinary rural townships, among which, it may be remarked, is the power to enact ordinances, to prevent or regulate the erection or

maintenance of any posts in or upon any street or highway or public place, and to remove such posts if already erected there. *P. L. of 1873, p. 27.* In October, 1886, the township committee passed an ordinance by which it forbade the erection of poles in the street by any telegraph, telephone or electric light company, without the consent of the street committee. The complainants have erected their poles since the passage of that ordinance, and have obtained no consent of the street committee to do so. It is not necessary, for the purposes of this motion, to decide the question whether the defendants are an incorporated town. It is enough to defeat the present application if it is merely doubtful whether they are not such municipality. If the defendants are an incorporated town, (and that is a disputed question of law,) the complainants have no claim to the relief which they seek. A complainant is not in a position to ask for a preliminary injunction when the right on which he founds his claim is, as a matter of law, unsettled. *Citizens' Coach Co. v. Camden Horse R. R. Co.*, 2 Stew. Eq. 299. In view of the numerous and extensive municipal powers with which the defendants are clothed, and which are such as are possessed by cities and by incorporated places denominated towns in legislative acts, it is most obvious that the defendants' claim to be an incorporated town is not without ground. The motion will be denied, and the order to show cause discharged, with costs.

NOTE.—This case is cited in *State, Winter, pros. v. N. Y. & N. J. Teleph. Co.*, *post.*

See note to *Grand Rapids E. L. & P. Co. v. G. R. E. L. & Fuel Gas Co.*, *post.*

**THE STATE, THE DOMESTIC TELEGRAPH AND TELEPHONE
COMPANY ET AL., Prosecutors, v. THE MAYOR &c. OF NEW-
ARK, ET AL.**

New Jersey Supreme Court, 1887.

(49 N. J. L. 344.)

POLES IN STREETS.—POWER OF MUNICIPAL CORPORATION TO AUTHORIZE.

(Head note by the court) :

Authority on the part of a municipality to grant to any person, natural, or artificial, a right to erect telegraph or telephone poles, etc., in the public streets, can only be derived from the Legislature by express grant or by necessary implication from powers expressly granted.

The charter of the city of Newark does not confer authority on the city to grant such a right in the public streets.

The consent of a municipality to the erection of such poles in the public streets, contemplated by the act of April 9, 1875 (Revision 1174), and the supplement of March 11, 1880 (Laws 1880, p, 201), can only be given to corporations organized under those acts.

ON certiorari.

By agreement of counsel, the following (among other) facts appear :

On the 16th day of April, A. D. 1886, a communication was presented to the mayor and common council of the city of Newark, at a meeting of the common council held on that day, of which the following is a copy :

“ To the Honorable the Mayor and common council of the city of Newark, N. J. :

“ Gentlemen : The Citizens' Telephone Company, of Newark, N. J., respectfully petition your honorable body to grant to them the right to erect and maintain their poles and wires on the various streets, avenues and alleys of the city of Newark, subject, of course, to the charter and ordinances of the city, the poles and wires to be erected under the supervision of the street commissioner. The company agree, in consideration of this grant by the city, to furnish a telephone, with free toll to all connecting

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exchanges, to each of the public offices and departments of the city government, free of charge to the city, the public offices or departments where the same shall be erected to be designated by resolution of the common council.

“Dated April 16th, 1886.

“E. A. WILKINSON, *President*.

“J. C. CLAYTON, *Secretary*.”

And at the same meeting the said council passed a resolution, of which the following is a copy :

“*Whereas*, The Citizens' Telephone Company, a corporation created under the laws of this State, and composed of our own citizens, has presented to council a petition requesting permission to erect poles and string wires through the city, to establish cheaper telephonic service for the citizens ; therefore,

“*Resolved*, That permission to so erect poles and string wires be given to said Citizens' Telephone Company, as requested, upon the conditions stated in said petition ; provided, however, that no poles shall be erected on any street until the consent of the abutting property owner shall be first obtained.”

This resolution was approved by the mayor of the city on the 28th day of April, 1886.

The *certiorari* was allowed to bring up said resolution on the prosecution of the Domestic Telegraph and Telephone Company, of Newark, a corporation duly organized under the act of the Legislature of this State, entitled “An act to incorporate and regulate telegraph companies,” approved April 9th, 1875, and furnishing its subscribers in the city of Newark with telephonic intercommunication by means of poles and wires, erected by authority of said law, in the streets of said city, and of Jabez Fearey, Edward Weston and Marcus L. Ward, stockholders in said company, and owners of real estate located in various streets of said city.

Argued at November term, 1886, before Justices REED, MAGIE and PARKER.

For the prosecutors, *Henry Young* and *Thomas N. McCarter*.

For the defendants, *J. Frank Fort*.

The opinion of the court was delivered by MAGIE, J.:

Defendants' counsel first contended that prosecutors had no right to question the validity of the resolution brought before us by this *certiorari*. But the precise question thus raised was decided by this court in *Peoples' Gaslight Co. v. Jersey City*, 17 Vroom. 297. Under the authority of that case it is plain that prosecutors may, by such a writ, challenge the authority of the city of Newark to adopt the resolution in question.

It becomes necessary therefore to determine whether the city of Newark had power to do what by this resolution it attempted to do, that is, to grant to the Citizens' Telephone Company permission to erect poles, &c., in the public streets.

The public easement in highways is vested in the public and can be divested by nothing short of an exercise of the sovereign power. Neither non-user nor adverse user will defeat the public rights. *Smith v. State*, 3 Zab. 712; *Price v. Plainfield*, 11 Vroom. 608. The Legislature, representing the public, may release the public right by vacating the highway, may modify the public use by granting a right to use the highway for a horse railroad, or may restrict the public use by granting a right to erect poles and other obstructions in the highway. What the Legislature may thus do, it may delegate authority to do. Thus, from the earliest history of the State, authority to vacate highways in country districts has been conferred on special tribunals. Like authority has frequently been conferred on municipalities. No reason appears why all such authority possessed by the Legislature may not be thus delegated. But the delegation of such power must plainly appear, either by express grant or by necessary implication. *Morris and Essex R. R. Co. v. Newark*, 2 Stockt. 352, 353; *Jersey City Gas Co. v. Dwight*, 2 Stew. Eq. 242; *Montgomery v. Trenton*, 7 Vroom. 79; *Paterson, &c., H. R. R. Co. v. Paterson*, 9 C. E. Green, 158; *Glasby v. Morris*, 3 C. E. Green, 72. The city of Newark derives its corporate existence from an act approved March 11th,

1857 (Pamph. L., p. 116), but nothing in that act is capable of being construed as delegating authority to the city to grant a right of obstructing the public streets to any person, natural or artificial, such as this resolution purports to grant.

The only parts of the charter to which we have been referred as justifying this claim of authority on the part of the city are subdivisions 7 and 8 of section 31.

The former, in substance, gives authority to regulate the streets and to prevent and remove obstructions therefrom. A similar clause in the charter of Trenton was held in this court not to authorize a grant of a right to lay a railroad in a public street, which would impede public travel. A like construction of this clause deprives the city of any claim of authority to pass this resolution.

Subdivision 8 gives authority to prevent or regulate the erection of any stoops, bay windows, areas, signs, or any post or erection, or any projection or otherwise, over or upon any street, &c. Reading the whole subdivision, I think it clear that the objects over which authority is designed to be given are only such as are appurtenant to the adjoining property, and used within the public street for its convenience. The power given relates to such modes of egress and ingress to adjoining property as are afforded by stoops, by cellar stairs, &c., and to such modes of use of business premises as are afforded by signs, awning posts and the like. This appears from the last clause of the subdivision which gives power to remove these things at the expense of the owner or occupant of the premises. But, apart from this view, the principle of the case of *Montgomery v. Trenton*, *supra*, applied to this subdivision, requires us to hold that authority to prevent or regulate an obstruction will not include authority to license such obstruction not otherwise justified by law.

Neither of these clauses, therefore, support the city's claim of authority to pass this resolution. No other part of the charter seems to give the least countenance to the claim.

Nor can this resolution be sustained on the theory that it merely expresses the consent of this municipality, representing the inhabitants within it, to such an obstruction of its public streets. Authority to thus consent must obviously have been conferred by the legislature. No such authority can be discovered in the charter.

Defendants cannot appeal to the provisions of the "Act to incorporate and regulate telegraph companies," approved April 9, 1875 (*Rev. p.* 1174), because the Citizens' Telephone Company, the recipient of the grant made by this resolution, was not incorporated under that act, nor under the supplement to it, approved March 11, 1880. *Pamp. L.*, *p.* 201. The consent of the municipality provided for by those acts may only be given to corporations organized thereunder.

Nor can any support for this resolution be discovered in the general corporation act (*Rev. p.* 174), under which the Citizens' Telephone Company claims to have been organized.

Whether such a company could organize and acquire a corporate existence under that act was much discussed on the argument. The passage of the above mentioned act of 1875, and the supplement of 1880, providing for the organization of telegraph and telephone companies, in modes and under conditions quite inconsistent with those prescribed by the general corporation act, seems to be a strong legislative declaration to the contrary. So, it was strongly urged that if the Citizens' Telephone Company acquired a corporate existence by its organization, it acquired thereby no right to make use of the public streets. If it has thereby acquired such right, the restrictions and limitations imposed on such companies by the acts of 1875 and 1880 may be evaded by the simple expedient of an organization under the general corporation act.

But these questions are not necessarily involved in this case. The sole question is whether the city had power to pass this resolution, and nothing can be found in the general corporation act supporting the claim of the city.

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Other questions raised and argued by prosecutors need not be considered. For since we fail to find that any authority to pass this resolution has been conferred on the city, it must be set aside.

NOTE.—See note to *Grand Rapids E. L. & P. Co. v. G. R. E. L. & Fuel Gas Co.*, *post*.

CITY OF HANNIBAL, Respondent, v. MISSOURI & KANSAS
TELEPHONE COMPANY, Appellant.

St. Louis Court of Appeals, May 8, 1888.

(31 Mo. App. 23.)

TELEPHONE FIXTURES.—MUNICIPAL CONTROL.

By statute, in Missouri, telephone companies are permitted to set their poles, wires and other fixtures along and across the highways of the State, only so as not to incommode the public, and subject only to municipal control as to (1) the location of posts, (2) the kind of posts, (3) the height of wires.

The city of Hannibal passed a resolution, requiring a particular telephone company to remove all its fixtures from the streets, which being performed as a condition precedent, the ordinance authorized the erection of new poles, but only at street intersections.

Upon appeal from a judgment awarding the penalty imposed by the statute for its violation,

Held, that inasmuch as the ordinance discriminated against one of several telephone companies, demanded a re-location of its poles without apparent good reason, demanded a total removal of all standing poles as a condition precedent to the right of re-location, and failed to provide for any practicable re-location, such features of oppression and unreasonableness were presented as to call for the vacating of the ordinance.

Held also that the ordinance was class legislation of a kind which, even if not unconstitutional, could not be upheld even if enacted by the State Legislature, much less, when enacted by an inferior body.

Case of this series cited in opinion : *State v. Flad*, *ante*, p. 128.

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APPEAL from the Hannibal Court of Common Pleas.
The facts appear in the opinion.

Harrison & Mahan, for the appellant.

Thomas F. Gatts and *David H. Eby*, for the respondent.

ROMBAUER, P. J., delivered the opinion of the court :

The plaintiff is a municipal corporation and the defendant is a telephone company incorporated under article five, chapter twenty-one, of the Revised Statutes.

It appears that in 1879--80 the Hannibal Telephone Company and its grantors erected, under authority of a city ordinance authorizing the erection and maintenance of a telephonic exchange in said city, a number of telephone poles, including the poles in controversy, along Broadway, which poles have been used ever since by said company and its successors in connection with said telephonic exchange. The defendant is a successor of said Hannibal Telephone Company.

In May, 1886, some controversy arising between the city and defendant as to the defendant's compliance with the original ordinance authorizing the erection of such poles, the following ordinance was passed by the city council, and approved by the mayor :

“ An ordinance requiring the removal from the sidewalks of the city of Hannibal, of the posts, piers and abutments of the Missouri and Kansas Telephone Company.

“ Be it ordained by the city council of the city of Hannibal :

“ Section 1. That the Missouri and Kansas Telephone Company, a corporation doing business in the city of Hannibal, in the State of Missouri, are hereby notified, ordered and required to remove and take away from each and every public sidewalk, constituting a part of, or being in or on, any of the public streets, avenues or alleys, in said city, and within thirty days from the date of the publication of this ordinance, all posts, piers and abutments now standing or being on the said sidewalks or any of them, and owned, controlled, operated or maintained by said Missouri and Kansas Telephone Company.

“ Sec. 2. In lieu of the present location of said posts, piers and abutments, and in consideration of the alteration in the location of the same,

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as provided for in section one of this ordinance, license is hereby granted to said telephone company to re-locate, place and erect upon any of the public streets in said city, wherein any of said posts, piers and abutments are now standing, being or erected, such posts, piers and abutments, as said company may see proper to erect ; provided, however, that such future erection and re-location of said posts, piers and abutments by said company, in said streets, shall be outside of and not immediately contiguous to the sidewalks of said city, and shall be only at the vertices of the angles of intersection of streets in said city, as they lie outside of said sidewalks ; and, provided further, that the right to reërect or re-locate said posts, piers and abutments shall be and is conditional upon said company first complying with the requirements of section one of this ordinance.

“ Sec. 3. In the event that said telephone company shall fail, neglect or refuse to comply with the requirements of section one of this ordinance, then, and in that event, the street commissioner of said city is hereby authorized, directed, instructed and empowered to remove the posts, piers and abutments mentioned in said section one, at the expense of the persons, companies or corporation owning, operating or maintaining the same, and to report the cost of such removal to the attorney of said city, who shall proceed to collect the same from the parties liable therefor.

“ Sec. 4. Any person, company or corporation, that shall violate any of the provisions of this ordinance, or that shall fail, neglect or refuse to comply with the same, shall forfeit and pay to said city a fine of one hundred and fifty dollars.”

The defendant upon demand neglected and refused to remove its poles, as required by the first section of the ordinance. The city thereupon filed a complaint against it before its recorder for the recovery of the fine mentioned in the fourth section, and upon a trial of such complaint before the Common Pleas Court, on appeal, obtained judgment for the amount of the fine and costs. From that judgment the defendant prosecutes the present appeal, and assigns the following errors : (1) That the complaint states no cause of action and the court erred in admitting evidence in its support ; (2) that the evidence substantiates no cause of action, and the court should have rendered judgment for the defendant ; (3) that the court gave an erroneous instruction or declaration of law.

In *State ex rel. v. Flad*, 23 Mo. App. 186, the respective rights of telephone companies, and the municipalities whose streets they occupy with their poles, were defined as follows : “ By section 879 of the Revised Statutes, it is pro-

vided as follows: 'Companies organized under the provisions of this article for the purpose of constructing and maintaining telephone or magnetic telegraph lines; are authorized to set their poles, piers, abutments, wires and other fixtures, along and across any of the public roads, streets and waters of this State, in such manner as not to incommode the public in the use of such roads, streets and waters.' The only limitation imposed by the Legislature upon the privilege relating to the use of the streets and alleys of cities and towns for telephone posts is embodied in section 888 of the Revised Statutes, which is in the following language: 'The mayor and aldermen, or board of common council, of any city, and the trustees of any incorporated town, through which the lines of any telephone or telegraph company are to pass, may, by ordinance, or otherwise, specify where the posts, piers or abutments, shall be located, the kind of posts that shall be used, the height at which the wires shall be run; and such company shall be governed by the regulations thus prescribed; and after the erection of said telephone or telegraph lines, the said mayor and aldermen, or board of common council, and the trustees of any incorporated town, shall have power to direct any alteration in the location or erection of said posts, piers or abutments, and also in the height at which the wires shall run, having first given such company or its agents opportunity to be heard in regard to such alterations.' It will be seen that this limitation relates exclusively to three subjects. (1) The place where the posts, piers or abutments shall be located; (2) the kind of posts that shall be used; (3) the height at which the wires shall be run."

The defendant does not question the right of the city in this instance to make a regulation in regard to its poles "as to the place where the posts, piers or abutments shall be located," but contends, that when posts are once located an alteration in their location cannot be arbitrarily made without some cause showing a necessity for the alteration. As the complaint fails to state any necessity for the change

or any valid reason for the passage of the ordinance providing for the re-location, the defendant objects to it as stating no cause of action.

The Recorder's Court of Hannibal, where the complaint was originally filed, is not a court of record. Very informal complaints are held sufficient when filed before a justice, and we are not prepared to say that the complaint is fatally defective for the reason assigned. There was, however, no proof that the existing location of defendant's poles incommodes the public, or that any good cause existed for the contemplated removal; and in the absence of such proof the ordinance cannot be upheld. Besides that, the proof shows and the court so found that the contemplated re-location is impracticable, as it would place part of the defendant's poles at too great a distance from each other for practical operation of its lines. So finding, the trial court properly declared that part of the ordinance providing for a re-location illegal and void. As the two parts of the ordinance are necessarily dependent on each other, the case is not one where an ordinance void in part can be upheld as to other parts, and that of itself is fatal to plaintiff's recovery.

Municipal corporations are *prima facie* the sole judges of the necessity of their ordinances, and courts will not, ordinarily, review their reasonableness, when they are passed in strict pursuance of an express grant. *City of St. Louis v. Green*, 7 Mo. App. 468, S. C., 70 Mo. 562. Where an ordinance, however, is altogether unreasonable and oppressive, it may be vacated by the courts for that reason alone. *Corrigan v. Gage*, 68 Mo. 545; *Springfield Railway Co. v. City of Springfield*, 85 Mo. 674; *Kelly v. Meeks*, 87 Mo. 401.

It is shown in this case that other corporations use the same streets for similar purposes, and that there is no substantial difference between the location of their poles and those of defendant. It is further shown that the only practicable way of affecting a change of poles so as not to cause an interruption of business, is a gradual and fractional

change, the erection of new poles necessarily preceding the removal of the old. That an ordinance which discriminates against the defendant, which demands a re-location of its poles without apparent good reason, which demands a total removal of all standing poles as a condition precedent to the right of re-location, and which fails to provide for any practicable re-location, presents such features of oppression and unreasonableness as to call for the exercise of the powers of the court last above referred to, admits of no dispute.

We do not hesitate to declare the ordinance under which the defendant is prosecuted to be illegal and void for these reasons alone. There is, however, a further feature of this ordinance so extraordinary in its character that we cannot pass it in silence. It will be seen that it first demands that the defendant should do a certain thing, and then provides that any person, company or corporation, who shall fail to do the thing, which, in the nature of things, the defendant alone can omit to do, shall be guilty of a misdemeanor. This is class legislation of the most obnoxious character. Municipal corporations exercise only powers delegated to them by the Legislature, and where the Legislature has no power to do a thing it cannot delegate it to others. The constitutional inhibition imposed on the Legislature against class legislation is necessarily imposed on every municipality. Even in the absence of a special constitutional inhibition, such legislation could not be upheld. Thus Judge Cooley says that it can scarcely be doubted but that a regulation made for any one class of citizens, entirely arbitrary in its character and restricting their rights, privileges or legal capacities, in any manner before unknown to the law, "would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict." Cooley's Const. Lim. 393. See, for an elaborate discussion of this subject, *Bank v. Cooper*, 2 Yerg. 599, and *Jones v. Perry*, 10 Yerg. 59.

It necessarily results from the foregoing observations

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that the judgment of the court upon the uncontroverted facts was an erroneous conclusion of law, and must be reversed. As no prosecution can be had under an ordinance which we are bound to declare illegal and void, no useful purpose can be subserved by remanding the cause.

Judgment reversed. All concur.

NOTE.—See note to *Grand Rapids E. L. & P. Co. v. G. R. E. L. & Fuel Gas Co.*, *post*.

GRAND RAPIDS ELECTRIC LIGHT AND POWER COMPANY v.
GRAND RAPIDS EDISON ELECTRIC LIGHT AND FUEL
GAS COMPANY ET AL.

U. S. Circuit Court, W. D. Michigan, S. D. Jan. 9, 1888.

(33 Fed. R. 659.)

EXCLUSIVE PRIVILEGE IN STREETS.

There is no power, express or implied, in the common council of the city of Grand Rapids, to grant to one electric light company the exclusive privilege of using the streets of the city for the maintenance of its lines.

MOTION to dissolve a preliminary injunction. The complainant had been given by the common council of Grand Rapids, Michigan, the exclusive use of the streets for a period of years, for the maintenance of electric light and power lines, and subsequently the defendant had been granted the same privileges, but not exclusive.

The facts are fully stated in the opinion.

T. J. O'Brien and *J. H. Campbell*, for defendant, on motion to dissolve injunction; *Eugene H. Lewis*, for defendant.

Blair, Kingsley & Kleinhaus, for complainant.

JACKSON, J.: The leading and material facts in relation to the matter in controversy, and on which rest the proper determination of the question involved in the present motion, are, briefly, these: By the charter of the city of Grand Rapids the common council thereof were invested with the following powers and duties relating to the matters under consideration:

"Tit. 3, Sec. 10. The common council..... shall have power within said city to enact, make, continue, establish, *modify, amend and repeal such ordinances, by-laws and regulations* as they deem desirable, within said city, for the following purposes:"

"*Twenty-fifth.* To regulate the lighting of the streets and alley, and the protection and safety of the public lamps, and to employ a suitable person to superintend the same, to prescribe his duties, and fix a compensation therefor."

"*Thirty-fifth.* To provide for the cleaning of the highways, streets, avenues, lanes, alleys, public grounds and squares, crosswalks and sidewalks in said city, and to require the owners or occupants of property on any paved street or streets of said city to clean the said streets in front of, or adjacent to, the premises occupied by them to the center of said streets; to prohibit and prevent the incumbering thereof in any manner whatsoever, and to remove any obstructions therefrom, and to prevent the exhibition of signs on canvas or otherwise in and upon any vehicle standing or traveling upon the streets of said city; to control, prescribe and regulate the mode of constructing and suspending awnings, and the exhibition and suspension of signs thereon; to control, prescribe, and regulate the manner in which the highways, streets, avenues, lanes, alleys, public grounds and spaces within said city shall be used, and to provide for the preservation of and the prevention of wilful injury to the gutters in said highways, streets, lanes and alleys; to direct and regulate the planting, and provide for the preservation of ornamental trees therein.

"*Thirty-sixth.* To provide for and regulate the lighting of public lamps, and the erection of lamps and lamp-posts and suitable hitching-posts; to prohibit all practices, amusements, and doings in said streets having a tendency to frighten teams and horses, or dangerous to life or property; to remove or cause to be removed therefrom all walls and structures that may be liable to fall therein, so as to endanger life or property."

"Tit. 6. sec. 1. The common council shall have the care and supervision of the highways, streets, bridges, lanes, alleys, parks and public grounds in said city, and it shall be their duty to give directions for the repairing, preserving, improving, cleansing and securing of such highways, bridges,

lanes, alleys, parks and public grounds, and to cause the same to be repaired, cleansed, improved and secured, from time to time, as may be necessary; to regulate the roads, streets, highways, lanes and alleys, already laid out or which may hereafter be laid out, and to alter such of them as they shall deem inconvenient, subject to the restrictions contained in this title.'

The complainant is a corporation organized March 31, 1880, under the laws of the State of Michigan, and its powers and franchises are defined by the statute under which it was created and organized. It was invested by the law of its creation with no *exclusive* rights, franchises or privileges. On the nineteenth day of April, 1880, the common council of Grand Rapids, deeming it expedient and for the welfare and advantage of the city that a system of lighting by electricity should be established therein, for the purpose of inducing the complainant to undertake the work of supplying the city with electric light, or lights, passed the following ordinance:

"An ordinance authorizing the 'Grand Rapids Electric Light & Power Company,' to erect the necessary lines for the transmission of power and light by means of electricity in the city of Grand Rapids. Passed April 19, 1880. First published April 22, 1880. Amended April 27, 1880.

"The common council of the city of Grand Rapids do ordain as follows:

"Section 1. That the 'Grand Rapids Electric Light & Power Company,' as a body corporate under that or such other name as the said corporation may hereafter adopt, be and they are hereby authorized *to use exclusively for the term of fifteen years from the passage of this ordinance, any and all* the streets, lanes, alleys, bridges and public grounds of said city, including any territory that may be hereafter added to the same, for the purpose of laying down or suspending on suitable poles or supports in said streets, lanes, alleys, bridges and public grounds from time to time, as said company may desire, wires, cables or other conductors of electricity for distributing and supplying said city and the inhabitants thereof with electricity for light and power; provided, that the common council of said city shall have the control and direction of the places, times and circumstances in which said lines, wires, cables, poles or supports may be erected or laid down, and that said company shall not unnecessarily obstruct the passage of any such street, lane, alley, bridge or public ground, and shall, within a reasonable time after making any opening or excavation for the purposes aforesaid, repair and leave said street, lane, alley, bridge or public ground in as good condition as before said opening or excavation was made and under the direction, and to be approved of by the city surveyor.

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“Sec. 2. The privileges hereby granted are upon the express condition that said company shall, on or before the first day of January next, commence the work of manufacturing electricity for lighting said city, and shall supply the same to said city and the inhabitants thereof at a reasonable price along the lines which are or shall thereafter be constructed by said company, and that they shall extend their said lines of conductors, and increase their facilities for the producing the electricity, as the demand for its use, at such reasonable price, may warrant.

“Sec. 3. Any temporary failure on the part of said corporation to perform any of the conditions of this ordinance. when such failure is occasioned by any unavoidable accident, shall not be construed as a forfeiture of the privileges hereby granted; provided the same shall be repaired within a reasonable time.

“Sec. 4. That if said company shall make any opening or excavation in the streets, lanes, alleys, walks, or public grounds of said city, the same shall be done after notice to and under the direction of the common council or city surveyor, and said company, in case of any such excavation or other interference with any street, alley or public ground, shall forthwith, under direction of the city surveyor, restore the street, alley or ground to its original condition, and all such places shall be left by said company in as good condition as before disturbed by the company, and in case of failure to do so within what the common council or city surveyor shall deem reasonable time, the said common council or city surveyor may cause it to be done, and the company shall be liable to pay the expense thereof on demand; and in case the erection of wire cables or other conductors of electricity by said company shall be necessary over the streets, alleys and public grounds of said city, then the said company shall place the same at such places, and secure the same in such manner, as shall be approved by the common council; and this is not to grant permission to erect such conductors over any such streets, alleys or grounds, except at such places as shall be agreed to by said common council; but it is expressly provided that in no case shall lines used as conductors of electricity be placed over and above the lines and wires used by the city in its fire-alarm telegraph apparatus, and that the location at which conductors shall be maintained shall at all times be subject to the control of the common council.

“Sec. 5. The said company shall be liable to compensate the city of Grand Rapids and all corporations and persons for all damages that may grow out of the use of the public ways and grounds of said city for their said business, and for having opened or incumbered any street, alley, sidewalk or public space, or from any cause whatever, connected with the franchise hereby conferred, and said corporation shall at all times be subject to all ordinances now in existence or which may hereafter be passed, relative to the streets, alleys and public grounds in said city, and the manner of making improvements therein, and all ordinances relating to the means of public protection while excavations are being made in said streets, alleys and public grounds; and said corporation shall be liable for

any loss the city of Grand Rapids may suffer in case the city shall be liable for damages on account of anything that shall grow out of the operation or business of said corporation, or those acting under its authority, or under its agents.

“Sec. 6. (As amended April 27, 1880.) The city of Grand Rapids expressly reserves the right to alter and amend this ordinance in any manner necessary for the safety or welfare of the public, and, in case it is necessary to do so, to protect the public interest ; but the exclusive rights and privileges hereby granted shall not be impaired or abridged by such alteration or amendment.

“Sec. 7. Said company shall, within thirty days after the acceptance of this ordinance, execute to the city of Grand Rapids a bond in the penal sum of twenty thousand dollars, with sufficient sureties, to be approved by the common council and filed in the office of the city clerk, conditioned to compensate the city for all damages, costs, expenses and outlays which may come to said city by reason of the actions of the said company, or its agents, servants or employes, or persons doing service upon the works of said company, and from all loss and damage the city shall suffer from any cause that shall grow, directly or indirectly, out of the granting this franchise, or out of anything that shall be done under the name or for the company operating under the same, and said bond shall also be conditioned to perform each and every requirement of this ordinance by said company to be by them performed, and to obey all ordinances of said city passed or that may be passed. Said bond shall be renewed once in every two years, and as much oftener as the said council shall require by resolution.

“Sec. 8. That the common council may, by resolution, at any time direct the said company to erect upon any streets or places in said city, the necessary apparatus for furnishing the residents light and power by electricity, as contemplated by this ordinance, and in case of the passage of such resolution, the said company shall signify its acceptance of the resolution and willingness to forthwith proceed to erect such apparatus in such streets and places, and to furnish light and power to such as may desire ; and in case said company shall, for thirty days after notice of such resolution, neglect to accept the same, and proceed to such erection of such apparatus, then the exclusive right of said company to the use of such streets and places shall cease, and the said council may grant the use of said streets and places to some other person or company.

“Sec. 9. This ordinance shall take effect from and after its acceptance by the president and directors of the said ‘Grand Rapids Electric Light and Power Company,’ which acceptance shall be filed with the city clerk within thirty days from and after the passage of this ordinance.”

This ordinance was duly accepted by the complainant, who thereafter proceeded at considerable expense to erect works, and extend its wires, in order to supply the city with electric light. These works were still being main-

tained, and the ordinance substantially complied with by the complainant, when, on May 20, 1887, the common council of Grand Rapids passed an ordinance granting to the defendant, the Grand Rapids Edison Electric Light & Fuel Gas Company, a corporation organized March 30, 1887, under the general laws of Michigan, for the purpose of supplying electricity for light and power, the right to use the streets of said city for the purpose of erecting supports, running wires or cables, etc., in the distribution of electric lights throughout the city. The defendant accepted said ordinance, which contained the same general provisions as the ordinance of April 19, 1880, except that it conferred no exclusive rights or privileges, and was proceeding with the erection of its works, and the running of its wires and cables, when the complainant filed in this court its present bill, claiming that its acceptance of the ordinance of April 19, 1880, constituted a contract with the city of Grand Rapids, which conferred upon it the *exclusive* right to the use of the streets, lanes, alleys, bridges, and public grounds of said city for the purpose of supplying the same and the inhabitants thereof with electric light; that the ordinance of May 20, 1887, granting to the defendant, the Grand Rapids Edison Electric Light & Fuel Gas Company, the right to use said streets, etc., for the purpose of distributing its electric light and power throughout said city, was an *impairment* of the complainant's contract rights under the prior ordinance of 1880; and praying that said defendant company, its officers and agents, who are made co-defendants, be enjoined from using the streets of Grand Rapids for the purpose aforesaid. A preliminary injunction was granted, and the defendant corporation, having since filed its answer, now moves to dissolve that injunction. Several grounds have been presented and urged in support of this motion, but, in the view which the court takes of the legal principles involved in the case, there is only *one* controlling question to be settled and determined in order to a proper disposition of the present application; and that is, were the common council of Grand Rapids, under the

city's charter powers, invested with the requisite authority to confer upon the complainant the *exclusive* right to use the streets of that city for the purpose of running its electric wires, cables, and supports under or over the same? In other words, had the common council the power, under the city's charter, to grant to complainant the *exclusive* right and privilege of using the city's streets for said purpose?

It may be considered as settled by the authorities that the complainant's acceptance of the ordinance of 1880 constituted a contract between it and the city of Grand Rapids; but the *exclusive* right to the use of the streets which this ordinance undertakes to confer upon the complainant for the period of 15 years, and which it is claimed formed an essential and material part of the contract, and which it is insisted the ordinance of May 20, 1887, *impairs*, presents the *only* Federal question on which the jurisdiction of this court to hear and determine the controversy between the parties can be rested. So far, therefore, as this court is concerned, its action in sustaining or overruling the present motion, or in dissolving or continuing in force the injunction restraining the defendant corporation from using the streets of Grand Rapids under the ordinance of May 20, 1887, depends upon the question above stated, *i. e.*, whether the common council, under the city's charter, had the power to grant the complainant the *exclusive* right of using the streets of the city for the purposes aforesaid. It is conceded that in the charter of Grand Rapids, in force when said ordinance of 1880 was passed, there is no *express* power or authority conferred upon the common council to make such a grant of *exclusive* rights and privileges in, to, or over the streets of the city. The authority for the making of this *exclusive* grant must, therefore, as complainant's counsel properly admit, be found and sustained, if at all, upon what are called the *implied* powers of the common council. It is too well settled to need the citation of authorities in its support that municipal corporations, which are mere political

agencies of the government, forming but parts of the machinery employed in carrying on the affairs of the State, possess and can exercise *only* such powers as are "granted in *express words*, or those *necessarily* or *fairly* implied in or incident to the powers expressly conferred, or those *essential* to the declared objects and purposes of the corporation, not simply convenient, but *indispensable*." "Implied powers," says Judge COOLEY (Const. Lim., marg., p. 194), "are such as are *necessary* in order to carry into effect those expressly granted, and which must, therefore, be presumed to have been within the intention of the legislative grant." The courts of the country, State and Federal, have not been disposed to extend or enlarge the power of municipalities by implication; on the contrary, they have, in the main, applied to their charter powers substantially the same rule of strict construction that is applied to charters of private incorporation, on the ground, as stated in Cooley's Constitutional Limitations (marg., p. 195), that "the reasonable presumption is that the State has granted, in clear and unmistakable terms, all that it has designed to grant at all." In *Minturn v. Larue*, 23 How. 436, NELSON, J., speaking for the court, says:

"It is a well settled rule of construction of grants by the Legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public."

In *Railroad Co. v. Canal Com'r.* 21 Pa. St. 22, the rule is thus stated by the Supreme Court of Pennsylvania:

"When a State means to clothe a corporate body with a portion of her own sovereignty and to disarm herself to that extent of the power that belongs to her, it is so easy to say so, that we will never believe it to be meant when it is

not said. In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation."

To the same effect is the language of the Supreme Court in the case of *Fertilizing Co. v. Hyde Park*, 97 U. S. 666; and *Bridge v. Bridge*, 11 Pet. 420. Judge DILLON, in his note to section 91 of *Municipal Corporations* (3rd ed.), pp. 118, 119, after citing numerous authorities announcing the same general rule, says:

"The principle of strict construction should not be pressed in any case to such an unreasonable extent as to defeat the legislative purpose fairly appearing upon the entire charter or enactment. Perhaps the rule as it is briefly expressed in the text best embodies the result of the adjudications upon this point, namely, *if, upon the whole, there be fair, reasonable and substantial doubt* whether the Legislature intended to confer the authority in question, particularly if it relates to a matter extra municipal or unusual in its nature, and the exercise of which will be attended with taxes, tolls, assessments, or burdens upon the inhabitants, or oppress them, or abridge natural or common rights, or divest them of their property, the doubt should be resolved in favor of the citizen and against the municipality."

When it is considered that corporations, whether public or private, are the creatures of the legislative department of government, existing solely and alone by virtue of the sovereign will, and exercising *only delegated authority* of the State, the strict rule of construction applied to their powers is manifestly the correct one. This principle necessarily follows from the relation corporations occupy to the State. A municipal corporation is not a "*regnum in regno*," but an instrumentality, established by legislative enactment, to which certain powers of action are given for defined public purposes. The corporation may, through its proper officers, perform all acts or make all such contracts and incur all such liabilities as come legitimately within the powers conferred upon it; but all acts and con-

tracts beyond the scope of the powers granted are void. These fundamental principles lie at the foundation of the law relating to all corporations.

Before applying these general principles and rules for the construction of the *delegated* powers granted to corporations, whether public or private, it is proper to call attention to the fact that municipalities do not ordinarily or usually possess *exclusive* control over their streets; on the contrary, it is well settled by authority that the streets of a city are *public highways*, which it is the province of the government, by appropriate means, to render safe and convenient for the use of the public. "Public streets, squares and commons, unless there be some special restriction when dedicated or acquired, are for the *public use*, and the use is none the less for the *public at large*, as distinguished from the municipality, because they are situated within the limits of the latter, and because the Legislature may have given the supervision and control of them to the local authorities. The Legislature of the State represents the public at large, and has full and paramount authority over all public ways and public places." "To the Commonwealth here," says Chief Justice GIBSON, "as to the king of England, belongs the franchise of any highway as a *trustee* of the public; and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, railroads, canals or public roads laid out by the authority of the quarter sessions." 2 Dillon Mun. Corp. (3rd ed.), § 656. "As the highways of a State, including streets in cities, are under the paramount and primary control of the Legislature, and as all municipal powers are derived from the Legislature, it follows that the authority of municipalities over streets and the uses to which they may be put, depends entirely upon their charters or legislative enactments applicable to them." 2 Dill. Mun. Corp. (3rd ed.), § 680.

It is also well settled that the right to use the streets and other public thoroughfares of a city for the purpose of placing therein or thereon pipes, mains, wires and poles

for the distribution of gas, water or electric lights for public and private use, is not an ordinary business in which any one may engage, but is a *franchise* belonging to the government, *the privilege of exercising which can only be granted by the State or by the municipal government of the city, acting under legislative authority.*

The present case involves no consideration of the *power* of the *Legislature* to have conferred upon the complainant the exclusive right which it claims to the use of the streets of Grand Rapids for the purpose of laying down electric wires. It is conceded that the Legislature of Michigan, subject to the constitutional reservation of the right to amend, alter or repeal its charter, could have directly conferred upon the complainant the *exclusive* privilege of occupying the streets of the city for the distribution of electric light for public and private use. It is also conceded that the Legislature, subject to the same constitutional reservation, had the authority to confer upon the common council of Grand Rapids the power to grant the same *exclusive* right; and the question is, has it delegated such authority to the city or its common council in the powers with which it has invested it or them? It is manifest that this question is not controlled by such cases as *Gas. Co. v. Light Co.*, 115 U. S. 650, 6 Sup. Ct. Rep. 252; *Water Works v. Rivers*, 115 U. S. 674, 6 Sup. Ct. Rep. 273; *Gas Co. v. Gas Co.*, 115 U. S. 683, 6 Sup. Ct. Rep. 265; *Water Works v. Water Works*, 120 U. S. 64, 7 Sup. Ct. Rep. 405; *Slaughter House Cases*, 16 Wall. 36, and similar cases, relating to *legislative grants* of exclusive privileges, to be exercised within the limits of municipal corporations. These cases, however, establish one important principle, which has a direct bearing, and throws light upon the question here involved, and that is, that a municipality, under the usual powers conferred of providing a supply of light and water for the city and its inhabitants, and of establishing and regulating its streets, does not possess the *exclusive* authority over those subjects; that notwithstanding the grant of such powers to a municipal corporation, the State,

in whom rest the paramount rights to, and control over, all franchises and all public highways, may exercise its sovereign authority over all such subjects and confer rights and privileges, *exclusive* or not, as it may deem proper, within the limits of the municipality. These legislative grants of special franchises, whether exclusive or not, to be exercised in cities, are not sustained nor do they rest upon any *implied* repeal of powers previously delegated to the municipal corporation ; but they are supported upon the ground of sovereign right and authority which has never been parted with by the State.

To confer *exclusive* rights and privileges, either in the streets of a city or in the public highways, *necessarily involves the assertion and exercise of exclusive powers and control over the same*. Nothing short of the *whole sovereign power* of the State can confer *exclusive* rights and privileges in public streets, dedicated or acquired for *public* use, and which are held in *trust* for the *public at large*. This brings us directly up to the inquiry whether the Legislature of Michigan has delegated to the city of Grand Rapids the State's sovereign power and control over the streets of that municipality. If the charter powers of the city have invested it or its common council with the *whole sovereign power* and exclusive control over the streets within its limits, it might lawfully confer upon the complainant the exclusive right of user, which the ordinance of 1880 undertook to grant. If, however, the city or its common council possessed no such exclusive power and control, then the grant which it attempted to make to complainant was "*ultra vires*," and therefore void, so far as it purports to confer exclusive privileges in or over the streets of the city. It is not claimed that the city or common council was invested with such exclusive control and authority by virtue of the powers expressly granted in respect to the streets and public highways of the city. These express powers were "to provide for the cleaning of the streets, * * * to prohibit and prevent the incumbering thereof in any manner whatever, and to remove any obstructions there-

from ; * * * to control, prescribe and regulate the *manner* in which the highways, streets, lanes, alleys, etc., within said city shall be used," with the further provision that "the common council shall have the care and supervision of the highways, streets, bridges, alleys, parks and public grounds in said city, and it shall be their duty to give direction for repairing, preserving, improving, cleansing and securing of such highways, etc., and to cause the same to be repaired, cleansed and improved, from time to time, as may be necessary, to regulate the roads, streets, etc., already laid out, or which may be hereafter laid out ; and to alter such of them as they shall deem inconvenient, subject to the restrictions contained in this title." It is perfectly clear that these provisions of the charter confer no exclusive or sovereign power and control over the streets of the city. In respect to the subject of light, the common council are invested with power "*to regulate the lighting of the streets* and alleys, and the protection and safety of the public lamps, and to employ a suitable person to superintend the same, to prescribe his duties and fix the compensation therefor ; * * * to provide for and regulate the lighting of public lamps and the erection of lamps and lamp posts." It is urged on behalf of complainant, that to enable the city to execute and carry into effect this authority conferred and duty imposed upon it, of providing for and regulating the lighting of the streets and public lamps, there should be implied the power and right of so using the streets as to secure that important object, and that if the grant of the *exclusive* privilege of using the streets is necessary to obtain the benefit, convenience and advantage of an improved system of lighting, such as electric lights afford, the common council could lawfully confer such exclusive right ; or, to state the proposition in another form, it is this, that under its powers upon the subject of lights, the city or common council could adopt a system of electric lights for the streets and public lamps, and having so determined, if it became *necessary*, in order to secure such improved light, to grant the *exclusive* privilege of

using the public streets to the party who is to supply the same, the common council would have the implied power of conferring such exclusive right. This presents a new and rather novel way of enlarging the power of municipal corporations, and of securing for them the prerogatives of sovereignty. First, imply from the powers granted the right to adopt a new system of lighting the city's streets (which may be a proper and legitimate implication), then, when the common council has determined to procure such improved system, if difficulties arise, such as a demand for exclusive rights and privileges on the part of the company controlling the system, make another implication, from what is called the *necessity* of the case, and assume the right to confer sovereign franchises. The proposition is not only unsound, but dangerous in the extreme, and wholly unsupported by authority. Obstacles and difficulties in the way of exercising powers fairly and reasonably implied from those expressly granted can never operate to enlarge the original grant of authority. A private corporation is chartered by the State without exclusive rights; it demands *exclusive* privileges and sovereign franchises in and over a city's streets as a *condition* of supplying it with electric light; that demand, it is said, creates a *necessity* in the common council to grant or concede such exclusive privilege, and that *necessity* warrants an enlargement, by implication, of the city's charter powers, and confers upon it authority which clearly did not exist prior to such necessity. But, without dwelling on this position, which is utterly untenable, if we apply the rules of construction above mentioned, even adopting the more liberal one quoted from the note to section 91, Dill. Mun. Corp., to the powers which the city of Grand Rapids possesses over its streets and public lights, whether viewed separately or in connection with each other, it cannot be maintained that any power can be thence implied which would authorize the common council to make the exclusive grant contained in the ordinance of 1880. Is there not a "fair, reasonable and substantial doubt" whether the

Legislature intended, under the powers granted,—“to regulate the lighting of the streets and the protection of the public lamps,” “to provide for and regulate the lighting of the public lamps,” “to care for and supervise the streets, and to prescribe, control and regulate the manner in which the highways, streets, etc., shall be used,”—to confer upon the common council of Grand Rapids the exclusive sovereign authority and control over the streets of the city? Is such exclusive control *necessarily implied* in, or *incident* to, the powers expressly granted, or *essential* to the declared objects and purposes intrusted to the city government? Is not the granting of sovereign franchises in the public highways of the State a “matter extra-municipal or unusual in its nature?” In confining the inhabitants of the city for the period of 15 years to one company for their supply of the improved light, are they not deprived of the benefit of all competition during that period, and is there not thus imposed upon them the burden of a *quasi* monopoly, while they are at the same time prevented from availing themselves of any and all improvements which may be made in the systems of lighting? There can be but one answer to these questions, unless we disregard well established principles, and ignore the authority of judicial decisions on the subject. The rights and beneficial uses which the public or the inhabitants of cities have and are entitled to enjoy in the streets of a populous place are much more enlarged and various than with respect to ordinary highways, and there is a corresponding presumption against the intention to restrict or curtail such rights by conferring *exclusive* privileges therein.

Looking at the question of legislative intent from another standpoint, we find that it is not the policy of the State of Michigan to grant irrevocable franchises and privileges to private corporations. Article 15, § 1, of State Constitution, provides that “corporations may be formed under the general laws, but shall not be created by special act except for municipal purposes. *All laws passed pursuant to this section may be amended, altered or repealed.*” Now

by the ordinance of 1880, if valid, the complainant, a corporation organized under the laws of the State, has secured not only an exclusive franchise belonging to the State, but an *irrepealable privilege*, such as the Legislature could not have conferred. Is it to be presumed that the Legislature, under its constitutional authority "to confer upon incorporated citizens such powers of a *local legislative and administrative character as they may deem proper*," intended to invest the common council of Grand Rapids with the power to grant irrepealable franchises in or over the streets of that city, and thereby confer upon the grantees privileges or franchises not subject to alteration, amendment or repeal, rights which the Legislature could not itself have directly conferred. If such a presumption is proper, the conclusion is reached that the agencies or creatures of the State may, in the exercise of derivative and delegated powers, do what the Legislature itself could not. This would violate the well settled rule that the Legislature cannot do indirectly, through the local government, what the people have, by their Constitution, restricted it in doing directly. Dill. Mun. Corp. (2d. ed.), § 263. Again, by title 3, § 10, of the city's charter, it is provided that "the common council * * * shall have power within said city to enact, make, continue, *establish, modify, amend, and repeal such ordinances*, by-laws and regulations as they deem desirable within said city, for the following purposes," including the regulation of the streets, and lighting the same as above set out. It may well be doubted whether, under this grant of power, the common council can make or enact any ordinance which they may not afterwards modify, amend or repeal as they deem proper or desirable. But without undertaking to definitely settle this, it is very clear, from the power thus conferred to modify, amend, and repeal all ordinances they might pass, that the Legislature did not intend to bestow upon the common council authority to make exclusive grants of sovereign franchises and privileges, such as would restrict the local government in meeting the future wants and con-

venience of a growing city ; or if such legislative *intent* is to be inferred or implied from the powers expressly granted, there is reserved to the common council, not by implication, but in express terms, the sovereign right and power of amending, modifying or repealing the ordinance which grants such exclusive rights. Reading that reserved authority into the ordinance of 1880 would leave the common council at liberty to pass the further ordinance of 1887, which is claimed to be so in conflict with the former as to impair its obligation.

But aside from these general considerations, the decided weight of judicial authority is against the right of the common council of Grand Rapids to confer upon complainant the *exclusive* franchise which the ordinance of 1880 attempted to grant. Thus, in Dillon on Municipal Corporations (2nd ed.), § 547, it is said :

“A general grant of power in the charter of a city to cause it to be lighted with gas, while it carries with it, by implication, all such powers as are clearly necessary for the exercise of the authority expressly conferred, does not authorize the city council to grant to any person or corporation an *exclusive* right to use the streets of the city for the purpose of laying down gas pipes for a term of years, and thereafter until the works shall be purchased from the grantee by the city. The court admitted that the power to light the city would authorize the council to contract for gas, and to grant the contracting party the use of the streets, but denied its authority to make such use *exclusive* for a *determinate* future period.”

Citing the well considered case of the *State v. Coke Co.*, 18 Ohio St. 262, which has not only been followed in Ohio (see *Railroad Co. v. Smith*, 29 Ohio St. 291), but recognized with approval by the Supreme Court of the United States (see *Gas Co. v. Light Co.*, 115 U. S. 659 ; 6 Sup. Ct. Rep. 252). To the same effect, see Dill. Mun. Corp. (2nd ed.), §§ 61, 548, 549 ; Cooley's Const. Lim., marg., pp. 38, 207, 208 ; *Gaslight Co. v. Gas Co.*, 25 Conn. 19, (this case has been *qualified* in so far as it denied to the Legislature

itself the power to grant an exclusive franchise, but in respect to the city's power to do so it has not been questioned); *Gaslight Co. v. Saginaw*, 28 Fed. Rep. 529; *Gas Co. v. Middletown*, 59 N. Y. 228.

In harmony with these decisions, and resting upon the same general principles which they announce, are the cases which deny to municipalities, under the grant of power to establish and regulate ferries within their limits, the authority to confer exclusive ferry franchises upon others. See *Dill. Mun. Corp.* (2nd ed.), § 78; *East Hartford v. Bridge Co.*, 10 How. 511; *Minturn v. Larue*, 23 How. 435; *Harrison v. State*, 9 Mo. 530; *McEwen v. Taylor*, 4 G. Greene, 532; *Wright v. Nagle*, 101 U. S. 796. So, in reference to street railways, it is well settled by the authorities that, under general powers, such as the city of Grand Rapids possesses over its streets and highways, its common council could not confer upon individuals or a private corporation the *exclusive* right to use the city's highways for street railway purposes. See *Cooley Const. Lim.*, 207, 208; *Davis v. Mayor of New York*, 14 N. Y. 506; *Milhan v. Sharp*, 27 N. Y. 611; *Railroad Co. v. Smith*, 29 Ohio St. 291; *Railroad Co. v. Railroad Co.*, 10 Wall. 52; *Railroad Co. v. Railway Co.*, 12 Fed. Rep. 308; *Railroad Co. v. Railway Co.*, 24 Fed. Rep. 306; *Railway Co. v. Railway Co.*, 79 Ala. 465; *Dill. Mun. Corp.* (2nd ed.), § 558, and cases cited.

The same principle is applied in reference to market houses with which a municipality may be authorized to provide itself. Thus in *Gale v. Kalamazoo*, 23 Mich. 344, a contract was made between Gale and the municipal corporation, under and by the terms of which the former agreed to erect a suitable market house building for the town, and place the same under the control of the president and trustees of the village for ten years at a stipulated rent. The president and trustees agreed that, during the continuance of the contract, there should be no other public market. It was held, Judge COOLEY delivering the opinion of the court, that this contract was invalid; that

the governing authority could not abdicate any of its legislative powers, nor preclude itself from meeting, in the proper way, emergencies as they might arise; and that the contract created or vested a monopoly. In *Logan v. Pyne*, 43 Iowa, 524, under a power to license and regulate hackney carriages, omnibuses, and other vehicles, an ordinance was passed granting the exclusive privilege and franchise of running for hire omnibuses, for the purpose of carrying persons, etc. It was held that the granting of such exclusive rights was not within the city's power.

If the decisions of the Supreme Court of Michigan were in conflict with the foregoing authorities, we should respect them, and conform our own to their construction of the powers of their municipalities, under the general rule laid down by the Supreme Court of the United States, that "when the settled decisions of the highest court of a State have determined the extent and character of the powers which its political and municipal organizations shall possess, the decisions are authoritative upon the courts of the United States." But after a careful review of the Michigan cases cited by counsel, I am unable to discover in them any want of harmony with the general principles laid down in the authorities which have been referred to. *Gale v. Kalamazoo*, 23 Mich. 344, is strictly in line with these authorities; nor can I find that it has been either questioned, qualified or overruled. Again, in *Grand Rapids v. Whittlesey*, 33 Mich. 109, it was held, in conformity with the views herein expressed, that charter powers which conferred upon the municipality supervision and control of the streets of the corporation were nothing more than the powers possessed by township officers over country highways; that the power was the usual authority given cities over their streets and nothing more. And in the case of *Grand Rapids v. Hydraulic Co.*, decided July, 1887, and reported in 33 N. W. Rep., 749, the Supreme Court of Michigan clearly assert and maintain the State's sovereign control and authority over the streets of Grand Rapids.

The Michigan cases cited by complainant's counsel in no way conflict with the foregoing positions and decisions, nor have they any direct bearing upon the question under consideration. They certainly do not establish that the Supreme Court of Michigan has given any broader or more liberal construction to the ordinary charter powers of the State's municipal corporations than those herein expressed and indicated by the authorities cited. I cannot discover in these decisions of the Michigan Supreme Court any general policy of the State in respect to municipalities and their powers, which may be legitimately invoked in support of the validity of the ordinance of 1880, so far as it attempts to grant the *exclusive* use of the city's streets to complainant for the purposes aforesaid.

There are several decisions of State courts which sustain the complainant's claim. The most direct and best reasoned is that of *City of Newport v. Light Co.*, 8 Ky. Law Rep. 22, in which it is held that "when a municipal corporation has the power, express or implied, to contract with others to furnish its inhabitants with the means of obtaining gas, at their own expense, it has the power to make a contract granting to a corporation the exclusive right to the use of the streets for that purpose for a term of years." The charter of the city contained no power, in express terms, authorizing the council to grant an exclusive privilege. The court rested its opinion on the grounds: *First*, that the power given the municipality to provide for lighting the city *included* the power to grant the exclusive right to the use of the streets for that purpose; and, *secondly*, that the Newport Light Company was invested, "in express terms, by a provision contained in its charter, with the right to *furnish any city, town, district, corporation or locality, or any public institution, manufacturing establishment or private premises, with gas or other light, for such time and on such terms as may be agreed on by the parties.*" The first of these grounds is in conflict with the decided weight of authority, and the second presents the doubtful question whether the right to contract, as con-

ferred upon the private corporation, can operate to enlarge by implication the powers of the municipality, so as to authorize it to grant *exclusive* privileges. If this decision, which is subject to the criticism made upon it by Judge BROWN, in *Gaslight Co. v. City of Saginaw*, 28 Fed. Rep. 537, can be sustained, it must stand upon the *second*, and not upon the *first*, ground upon which it is placed. In *Des Moines St. Ry. Case* (Iowa), 33 N. W. Rep. 610, the city was authorized to grant or prohibit the laying down of street car tracks within its limits. The court held that, although there was no grant of power in express terms authorizing the council to confer an exclusive privilege in the use of the streets, that under the circumstances of the case, and to procure a better public service, the council could grant a valid *exclusive* right for the *limited period* of 25 years, such contract being *necessary* to secure the service which it might not otherwise be able to obtain. We cannot assent to the correctness of this decision, nor to the proposition which the complainant's counsel urges in connection therewith, that the *reasonableness* of the period for which the *exclusive* right is conferred constitutes an element in determining the city's authority to make the grant. It is assumed that the authority to grant *exclusive* privileges, under implied powers, is *co-extensive* with the municipality's power to contract; that when the contract is reasonable as to the period of its duration, the authority to grant *exclusive* franchises during the same period must follow as a necessary implication. The learned district judge for the western district of Michigan, as I read his opinion, takes this view of the subject, when he says :

“It is not intended to declare that the common council might grant an *exclusive* franchise in *perpetuity*, or for an *unreasonable time*, any more than it could contract for an unlimited period of supply, or for an unreasonable time, for that might be regarded as an abuse of its powers, and for that reason void ; but short of that it would seem that the power in the one case is the equivalent of that in the other.”

I cannot understand the principle on which this position is to be sustained. The authority of a municipal corporation to make contracts in respect to objects intrusted to its administrative care and supervision, as a local agency of the State, is *one* thing, while the power to grant *exclusive* franchises, which belongs to the sovereign, is *another* and *essentially different* matter. There is no necessary connection between them. To assert, therefore, that the latter is co-extensive with the former, is simply to assume the very proposition which is being discussed and controverted. We have endeavored to show, upon principle and adjudged cases, that the authority of a municipality to grant *exclusive* privileges in its *streets* involves the exercise of the *whole* sovereign power over such highways; that nothing short of *exclusive* power and control will sustain the grant of *exclusive* rights. In the light of the authorities, which fully establish this proposition, how can it be successfully maintained that the judgment of the common council, or even of the courts, as to what is a *reasonable* period for the duration of a city's contract, is the measure or limit of its power in granting *exclusive* franchises in or over its streets? If the power rests in the city council to grant an exclusive privilege for 15 years, I cannot understand why the grant may not under the same authority be conferred for any longer period that may be determined on. The *power* requisite to confer an *exclusive sovereign franchise* for 15 years involves the exercise and operation of the same sovereign power which could make the grant for 100 or 1,000 years, or in perpetuity. If the authority does not exist to make the grant for the longer period, it does not exist to confer it for the shorter; for it requires the possession of the *whole exclusive* power and control to grant either the one or the other.

The next authority on the subject of exclusive privileges, cited and relied on by complainant's counsel, viz., *Water Works v. Atlantic City*, 39 N. J. Eq. 367, did not turn upon the city's authority, but was rested mainly upon the legislative grant of the privilege. The chancellor said :

“Of the power of the city to make the contract (apart from the covenant that it would not grant to any other person or corporation the right to lay water-pipes in the public streets) there can be no question. The city had the power, by its charter, to provide for a supply of water, and *in this power is implied* the power to furnish the supply by contract. The right of the company to protection in this case does not depend upon the covenant. * * * The franchise *granted by the Legislature* to the company is, by necessary implication, *exclusive*.” This is not, therefore, in conflict with the positions taken in this opinion. But if these, and other authorities cited by complainant’s counsel not so directly in point, had decided what is claimed for them, they are not in harmony with sound principles, nor with the great weight of adjudged cases on the question here involved, and they cannot, therefore, be recognized and followed.

This case has merited and has received at our hands the most careful investigation and consideration, and has been discussed more at large than is usual with the court, because of its importance, not only to the parties directly interested, but also to the public. As the result of that investigation and the principles herein announced, my conclusion is that so much of the ordinance of 1880 as undertook to confer upon complainant the exclusive use of the streets of Grand Rapids for the period of 15 years, for the purpose of laying down its wires therein or its poles thereon, etc., was beyond the power and authority of the common council, and therefore void; that the complainant cannot, therefore, question the validity of the ordinance of May 20, 1887, giving to the defendant corporation permission to use the streets of the city for a similar purpose, nor has complainant any valid or legal grounds on which to restrain the defendant from erecting its works, laying its wires and cables, or placing its poles and supports for wire and lamps in, upon and over the streets of said city. I am of the opinion that the preliminary injunction which restrained the defendant temporarily from so doing was improvidently granted, and

should be dissolved. It is accordingly so ordered, at the costs of the complainant.

NOTE.—The forgoing six cases relate to the power, and the limitations of such power, where it exists, of municipal corporations to authorize and regulate the use of streets for the erection and maintenance of electrical lines.

The same subject is considered in the following cases in vol. 1 of this series: *American Union Tel. Co. v. Town of Harrison*, p. 291; *Mutual Union Tel. Co. v. Chicago*, p. 506; *W. U. Tel. Co. v. Champlain Elec. Lt. Co.*, p. 822; and *Tuttle v. Brush Elec. Illuminating Co.*, p. 508.

In *Commonwealth v. Boston*, 97 Mass. 555, the defendant was convicted of suffering a nuisance in a public street. The alleged nuisance consisted of telegraph poles, belonging to a New York corporation. A statute existed, authorizing telegraph companies to erect posts and string wires along highways and public roads, and authorized certain officers of cities to designate in writing, to be recorded, the location and kind of posts, height of wires, &c. The poles complained of were erected pursuant to said statute and a proper designation as prescribed therein. It was held that the statute referred only to domestic corporations, and the judgment of conviction was affirmed.

In *Wandsworth District Board of Works v. United Kingdom Telephone Co., Limited*, 51 Law Times Reports, 148, decided by the Court of Appeal of England, a statute provided that "all streets being highways shall vest in and be under the management and control of the vesting or district board of the parish or district in which such highways are situate." *Held*, that this meant only the surface of the street, and so much above and beneath as was within the area of ordinary user; and as the wires of the telephone company, defendant, were stretched from chimneys upon private property, thirty feet above the street, and so not within the area of ordinary user, and were not shown to be dangerous so as to be a nuisance, an injunction to restrain their erection or continuance would not lie.

Somewhat similar was the case of *Am. Un. Tel. Co. v. Town of Harrison* (N. J.) *supra*, where the poles to support the wires were on private land. There it was held that under the statute the town authorities might have prescribed the height of wires, but not having done so, and the wires being twenty-five feet high and in no way impeding or endangering the ordinary use of the street, the municipal authorities were properly restrained from cutting the wires.

People, ex rel. v. Squire.

THE PEOPLE, EX REL. THE NEW YORK ELECTRIC LINES
COMPANY, Appellant, v. ROLLIN M. SQUIRE, as Commis-
sioner, Respondent.

N. Y. Court of Appeals, January 17, 1888.

(107 N. Y. 593.)

NEW YORK "SUBWAYS ACTS."—ACT OF 1885 HELD CONSTITUTIONAL.

New York Laws 1884, chap. 534, provided that all electrical wires in cities of a certain size (which included the city of New York) should be placed underground within a fixed period.

Laws 1885, chap. 499, supplementary to the above named act, provided for a board of commissioners of electrical subways, whose approval must be obtained by any company desiring to construct underground conduits for electrical wires.

The plaintiff, which before the passage of said acts had been incorporated for the purpose of constructing subways for electrical wires, and had obtained permission by ordinance of the common council of New York city to excavate certain streets for that purpose, subject to the supervision and control of the commissioner of public works, sought by mandamus to compel the commissioner to grant it a permit to excavate. It had concededly not complied with the requirements of the act of 1885, but challenged the constitutionality of that act.

Its grounds of challenge were all overruled and the act declared valid.

Among said grounds was this: That the effect of the law would be to impair the obligation of the relator's contract or franchise.

The court held:

- (1) That it was not intended to and did not have such effect.
- (2) That even if it did, it was within the police power of the State, to which contracts must yield.

APPEAL from an order of the General Term of the Court of Common Pleas of the city and county of New York, affirming a Special Term order denying a motion for a peremptory mandamus requiring the commissioner of public works to grant the relator a permit to make excavations in streets. The facts are stated in the opinion.

David Leventritt, for appellant.

D. J. Dean, for respondent.

RUGER, Ch. J.: The relator was incorporated in 1882, for the purpose of "owning, constructing, using, maintaining and leasing lines of telegraph wires or other electric conductors for telegraphic and telephonic communication, and for electric illumination, to be placed under the pavements of the streets," etc., in the counties of New York and Kings. Their organization was effected under chapter 265 of the laws of 1848, which, by a general law, authorized the formation of corporations of that character, and in 1883 it applied to and received from the common council of the city of New York, by virtue of the power conferred upon such council by chapter 397 of the laws of 1879, permission to construct conduits and lay wires in certain streets of New York, under certain conditions named in the ordinances, which, among other things, required that such work should be performed under the control and supervision of the commissioner of public works. The relator, in 1883, also filed with the clerk of New York county certain maps, plans and tabular statements, as required by the ordinance, and proceeded to collect the material and equipments necessary to build its structures and transact its business. No further progress seems to have been made by the relator until July, 1886, when application was made by it, to the department of public works of New York, for permission to open some of the streets of the city for the purpose of laying therein its wires and conductors. This permission was refused upon the ground that the relator had not obtained the approval of the subway commissioners of New York to its plans and construction.

This proceeding was brought to obtain a peremptory *mandamus* requiring the commissioner of public works to grant a permit to the relator, authorizing it to excavate in the streets of the city to enable it to construct conduits,

and lay electric wires and conductors therein. The application was denied at Special Term, and the General Term, upon appeal to that court, affirmed the order denying the writ. Section 1 of chapter 534 of the laws of 1884 provides that "all telegraph, telephonic and electric light wires and cables used in any incorporated city of this State having a population of five hundred thousand or over, shall hereafter be placed under the surface of the streets, lanes and avenues of said city." Section 2 requires that "every corporation * * * owning or controlling telegraph, telephone, electric or other wires or cables * * * shall before the 1st day of November, 1885, have the same removed from the surface of all streets or avenues in every such city of this State;" and section 3 provides that in case the owners of such property do not comply with the provisions of the act within the time limited, the local governments of the said cities shall cause such wires, etc., to be removed and placed under ground. These provisions do not seem to have been impaired in any material respect by the subsequent legislation of 1885 and 1886, and by express terms the act applies as well to existing companies as those thereafter to be formed.

By chapter 499, laws of 1885, it was provided that three persons should be appointed to constitute a board of commissioners of electrical subways in cities having a population exceeding five hundred thousand. By section 2 such boards were charged with the responsibility of enforcing the provisions of the act of 1884, and it was made their duty to cause to be removed from the surface of the streets, etc., all wires and cables used in the business of such electric companies and to put them under ground, wherever practicable, and cause them to be there operated and maintained, and said act of 1884 was declared to be amended to conform to the provisions of this act. Section 3 of said act provided that "when any company operating or intending to operate electrical conductors in any such city, shall desire or be required to place its conductors or any of them underground, * * * it shall be obligatory upon such

corporation to file with said board of commissioners, a map or maps, made to scale, showing the streets or avenues or other highways which are desired to be used for such purpose, and giving the general location, dimensions and course of the underground conduits desired to be constructed. Before any such conduits shall be constructed it shall be necessary to obtain the approval of said board, of said plan of construction so proposed by such company." By section 10 "all acts and parts of acts inconsistent herewith are hereby repealed."

These acts seem to have been intended to apply to all companies, and to whatever stage of their organization they may have reached. It is not claimed by the relator that it has ever filed with the board of commissioners its maps and plans as required by said act, or that it has obtained from them an approval of such maps, etc., and it is therefore clear that section 3 of the act of 1885 constitutes an insuperable objection to the relator's application, unless from some reason it be adjudged to be void for unconstitutionality.

The relator has met this question squarely, and challenges the constitutionality of the act upon several grounds, which may be summarized as follows :

1st. That it violates section 17 of article 3, in that it is a local bill and embraces more than one subject, not expressed in its title :

2nd. That it violates section 16 of article 3, providing that "no act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that an existing law, or any part thereof, shall be applicable except by inserting it in such act."

3rd. That said act levies a tax upon such companies, in that it is provided that the cost and expenses of such board of commissioners are authorized to be assessed by the comptroller of the State, when paid by him, upon the several companies operating electrical conductors in any such city of the State, which shall be required to place and operate its conductors underground.

4th. That if said act of 1885 applied to the relator, it was unconstitutional, as it impaired the rights which it had secured by virtue of the grant, from the authorities of New York, to construct conduits and lay wires and conductors in the streets of that city, and its acceptance thereof.

We are of the opinion that none of the points taken by the appellant are tenable. It is convenient to consider these questions in the order in which they have been stated :

First. The act referred to is not subject to the condemnation expressed in section 16, article 3, for the reason that it is neither a private or local bill, nor does it embrace more than one subject. The three acts of 1884, 1885 and 1886 all relate to the same subject, viz., that of placing all electrical wires and conductors in cities exceeding five hundred thousand population, under the surface of streets, etc., subject to the control of the local authorities ; and no provision is incorporated in either of these acts which is not strictly incidental to the general object intended to be accomplished. They relate simply to the mode and manner in which the provisions of the several acts in relation to the location and removal of electrical wires and conductors shall be applied and enforced, and constitute but one subject of legislation.

Neither is the act a local or private one within the meaning of the section referred to. Such was the decision of this court. *In the Matter of the N. Y. El R R. Co*, 70 N. Y. 327, and *In the Matter of Church*, 92 N. Y. 1. This act is general in its terms, applying to all cities in the State of a certain class, and to every corporation carrying on a business requiring the use of the electrical wires or conductors in such cities. That the number of such cities is limited or restricted does not make the bill a private or local one, within the constitutional meaning and intent of these words, was expressly decided in the cases referred to.

How many companies there are to which this bill applies

we have no means of determining, but the fact that a general law is passed regulating the operations of all such companies, in cities of the class referred to, does not constitute it a private or local bill, although it may happen that such companies are all located in one or more cities of the State.

Second. Neither do we think the act obnoxious to the objection that it incorporates in its provisions a prior act without inserting such act therein. The act is neither within the letter or spirit of the constitutional provision. There was no attempt to re-enact the law of 1884 by the law of 1885. The act of 1884 was a law by the force of its own enactment and so continues. It has never been repealed or re-enacted. The act of 1885 treats that of 1884 as a valid and existing law, and purports simply to provide methods by which it may be more conveniently carried out and enforced. It might be better, perhaps, to have all laws relating to this subject incorporated in a single act, but I apprehend it is no objection to a law, under the Constitution, that other laws on the same subject exist in other volumes of the statutes, or that the arrangement and location of such laws are faulty, or perhaps intricate and awkward, or involve labor and trouble to determine what in fact the law is. The object and intent of the constitutional provision was to prevent statute laws relating to one subject from being made applicable to laws passed upon another subject, through ignorance and misapprehension on the part of the Legislature, and to require that all acts should contain within themselves such information as should be necessary to enable it to act upon them intelligently and discreetly. It is obvious that it does not apply to an act purporting to amend existing laws, for in such a case no intelligent legislation could be had at all without a knowledge of the law intended to be amended.

It must be presumed that the Legislature is informed of the condition of a law which it is called upon to amend. It could never have been contemplated by the framers of the Constitution that any legislator would remain ignorant

of the provisions of law which it was proposed to change, or would require the provisions of such a law to be transcribed into the proposed legislation to enable him to act upon it judiciously and intelligently. Such a construction would lead to innumerable repetitions of laws in the statute books, and render them not only bulky and cumbersome, but confused and unintelligible almost beyond conception.

Third. The claim that this law is void because it imposes a tax on the companies referred to, cannot be maintained. The act of 1884 imposes the duty upon such companies to remove and cause to be laid underground all such wires and cables as are required in their business, and there is no reason why such companies should not be subjected to the payment of all expenses incurred in the construction of works required to carry on their own business.

This question has received a practical construction in the legislation of the State by its laws imposing upon banking and insurance corporations the expenses incurred by the government in the management and regulation of such institutions and their business operations. It has never been supposed that these laws imposed a tax within the meaning of the Constitution. A further answer to this point is found in the circumstance that even if it be admitted that the law does impose a tax, it does not necessarily invalidate the other provisions of the statute. The comptroller of the State is required to pay these expenses in the first instance, and no question arises over the liability of the companies until they are called upon by the comptroller to refund to him the amount of such expenses. This provision of the statute may be eliminated from it without impairing in the least the general scheme of the act, and upon well settled principles when this can be done, it affects so much of the act only as may be declared unconstitutional.

Fourth. The relator also claims that the act is obnoxious to the clause of the Constitution which forbids the enactment of any law impairing the obligation of contracts. It may be said in reference to this claim that the contract itself provides that the work of removal and replacement and of making excavations in the streets, avenues, etc., of the city

by any telegraph company for the purpose of laying its wires, shall be subject to the control and supervision of the commissioners of public works, and such commissioners might well require, in the exercise of their discretion, that the locality, time, mode and manner of performing such work should be approved by the officers having the general supervision of that subject in the city, before authorizing a single company, among the many claiming such privileges, to tear up its streets and construct trenches through its various thoroughfares and avenues, at their own will and pleasure.

But we are of the opinion, for other reasons, that this legislation did not and was not intended to materially impair or restrict the enjoyment of the franchise secured by the relator. The necessity of these acts sprung out of a great evil, which, in recent times, has grown up and afflicted large cities by the multiplication of rival and competing companies, organized for the purpose of distributing light, heat, water, the transportation of freight and passengers, and facilitating communication between distant points, and which require in their enterprises the occupation not only of the surface and air above the streets, but indefinite space under ground. This evil had become so great that every large city was covered with a net work of cables and wires attached to poles, houses, buildings and elevated structures, bringing danger, inconvenience and annoyance to the public. Extensive spaces under ground were also required to lay pipes and build trenches and arches, to transact the business of the various corporations requiring them. These works not only called for great skill to harmonize the various and conflicting claims of competing companies to rights above as well as beneath the ground, but a comprehensive plan and supervision, to prevent the constant disruption of the streets and the interruption of travel. The necessity of a remedy for these public annoyances had long been felt, and it finally culminated in the enactment of the several statutes referred to.

These statutes were obviously intended to restrain and

control, as far as practicable, the evils alluded to, by requiring all such wires to be placed underground in such cities, and be subject to the control and supervision of local officers, who could reconcile and harmonize the claims of conflicting companies, and obviate, in some degree, the evils which had grown to be almost, if not quite, intolerable to the public. The scheme of these statutes was not to annul or destroy the contract rights of such companies, but to regulate and control their exercise. They did not purport to deny them any privileges theretofore granted, but they did require that they should be exercised with due regard to the claims of others, and in such a way that they should cease to constitute a public nuisance, and should be enjoined in such a manner as to inconvenience and endanger the general public as little as possible.

That regulations of the character provided for in these acts are strictly police regulations, and such as no chartered rights can nullify or override, is too clear to admit of dispute. The primary and fundamental object of all public highways is to furnish a passageway for travelers in vehicles, or on foot, through the country. (Bouvier's Institutes, § 442.) They were originally designed for the use of travelers alone. But in the course of time and in the interest of the general prosperity and comfort of the public they have been put, especially in large cities, to numerous other uses; but such uses have always been held to be subordinate to the original design and use. Thus they have been appropriated in recent times for the reception of sewers, water pipes, gas pipes, pipes for heating and manufacturing purposes, underground railroads, trenches for wires for telegraph, telephone and other purposes, which all require in their construction the disruption of the pavements and the temporary interruption, at least, of the rights of travelers in the public highways. The due and orderly arrangement of the various and conflicting claims to privileges in the streets of large cities, would seem imperatively to require the creation of a neutral board, with controlling authority, to form a comprehensive plan by

which these various enterprises may be harmonized and carried on without detriment to each other, and with due regard to the rights of the public. Such power is pre-eminently a police power, and it is within the legitimate authority of a Legislature to delegate its exercise to municipal corporations.

An elementary writer has said that "the police of a State, in a comprehensive sense, embraces its system of internal regulation by which it is sought not only to preserve the public order and to prevent offenses against the State, but also to establish, for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others." Cooley on Const. Limitations, 572.

Justice SHAW said, in *Commonwealth v. Alger* (7 Cush. 84), that it was "a well-settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the rights of the community. All property in this Commonwealth * * * is held subject to those general regulations, which are necessary to the common good and general welfare."

Ch. J. REDFIELD, in *Sharp v. Rutland & Burlington R. R. Co.*, 27 Vt. 149, says: "This police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State."

The right to exercise this power cannot be alienated, surrendered or abridged by the Legislature by any grant, contract or delegation whatsoever, because it constitutes the exercise of a governmental function, without which it would become powerless to protect those rights which it was especially designed to accomplish. Thus it was held in *Presbyterian Church v. City of New York*, 5 Cow. 540, where the corporation had granted, with a covenant for

quiet enjoyment, a piece of land to the plaintiff to be used for church purposes and as a cemetery, that the power of the municipal government to pass an ordinance forbidding the use of said premises as a cemetery for the interment of the dead constituted no breach of the covenant. It was said that "the defendants are a corporation, and in that capacity are authorized by their charter and by-laws to purchase and hold, sell and convey real estate in the same manner as individuals. * * * They are also clothed, as well by their charter as by subsequent statutes of the State, with legislative powers, and in the capacity of a local legislature are particularly charged with the care of the public morals and the public health within their jurisdiction. * * * They had no power as a party to make a contract which should control or embarrass their legislative powers and duties." To the same effect is *People v. Morris*, 13 Wend. 325.

In *Wynehamer v. People*, 13 N. Y. 421, Judge COMSTOCK says, in speaking of rights of property: "The substantial right cannot be destroyed; its enjoyment is not an offense. * * * At the same time the mode of enjoyment in its broadest sense is subject to legislation, though it be affected very injuriously, provided a substantial right is left." The claim made by the relator in this case would authorize it to tear up the streets of the city at such times, in such places and under such circumstances as it might itself determine, regardless of the public convenience and welfare, and the rights of other claimants to the occupation thereof, and place it beyond the reach of all power by the Legislature to regulate the mode and manner of the enjoyment of its rights.

We do not think such a claim can be sustained. It is not within the terms of its contract, and if it were, it is still subject, in the respects mentioned, to the police power of the State.

The order of the General Term should be affirmed, with costs.

All concur.

Order affirmed.

 Illuminating Co. v. Hess et al.

NOTE.—In this action an appeal was taken to the Supreme Court of the United States. The decision of that court, affirming the judgment, is reported at 145 U. S. 175.

See note to *W. U. Tel. Co. v. Mayor of New York*, post.

This case is cited in the following cases in this volume: *Commercial Union Tel. Co. v. N. E. Teleph. & Tel. Co.*; *W. U. Tel. Co. v. Mayor of N. Y.*; *U. S. Illum. Co. v. Hess*.

THE UNITED STATES ILLUMINATING COMPANY v. JACOB HESS, THEODORE MOSS, DANIEL L. GIBBENS AND ABRAM S. HEWITT, Mayor of the City of New York, constituting the Board of Electrical Control for the City of New York, et al.

N. Y. Supreme Court, N. Y. County, Special Term, Chambers, Jan. 2, 1889.

(19 N. Y. St. R. 883; 3 N. Y. Supp. 777.)

NEW YORK SUBWAYS ACTS.—ACT OF 1887.

The act Laws 1887, chap. 716, section 1, creating the board of electrical control of the city of New York, gives the board full discretion as to when, where and how electrical wires shall be placed underground, and in absence of fraud or improper motives, its action will not be interfered with by the courts.

Said act is, it seems, constitutional; at any rate, it would not be decided otherwise by a judge at chambers.

For unjust discrimination on the part of the board, mandamus, as prescribed in the statute, and not injunction, would be the proper remedy. Case of this series cited in opinion: *People v. Squire*, ante, p. 176.

MOTION for injunction. The facts are stated in the opinion.

Butler, Stillman & Hubbard (William Allen Butler, Thomas H. Hubbard and John Notman, of counsel), for plaintiff.

William C. Trull (William N. Cohen, of counsel), for defendants Hess, Moss and Gibbens.

Henry R. Beekman, corporation counsel (*W. L. Turner*, of counsel), for defendants Hewitt, Newton and Richardson.

LAWRENCE, J.: This is a motion upon the part of the plaintiff to continue, during the pendency of the action, an injunction restraining the defendants, as follows: *First*, from interfering with or removing any of the plaintiff's poles, wires or fixtures in the city of New York; *Second*, from doing any act or acts tending to give to the Metropolitan Telephone Company, the Western Union Telegraph Company, and the East River Electric Light Company, or any other companies, other or greater facilities or privileges than shall be granted to the plaintiff. A thorough examination of the exceedingly voluminous papers read upon this motion has served to ripen into a conviction the impression which I intimated during the argument, that the plaintiff is not entitled to the injunction which is prayed for in the complaint.

It is quite obvious that under the act of 1887, c. 716, which creates the board of electrical control, the duty and responsibility of determining all questions as to placing, erecting, constructing, suspension, use, regulation, or control of electrical conductors or conduits, or subways for electrical conductors, in the city of New York, are to be determined by said board. See act, §§ 1, 3, 4. By the first section of said act it is provided: "From and after the passage of this act, and until the first day of November, 1890, the board of commissioners of electrical subways in and for the city and county of New York, heretofore appointed under authority of the act, chapter 499 of the Laws of 1885, together with the mayor of said city for the time being, are hereby constituted the board of electrical control in and for the city of New York. * * * All the powers and duties conferred or imposed by the said act, chapter 499 of the Laws of 1885, upon the commissioners appointed thereunder in and for the city of New York, and all the powers and duties heretofore by any law con-

ferred or imposed upon the local authorities of said city, or any of them, in respect to or affecting the placing, erecting, construction, suspension, maintenance, use, regulation or control of electrical conductors or conduits, or subways for electrical conductors, in said city, are hereby transferred to, and conferred and imposed on, and shall hereafter be exclusively exercised and performed by, the said board of electrical control, constituted as provided in this act, and its successors as hereinafter provided." By the third section of said act it is provided: "Whenever, in the opinion of the board hereinbefore constituted, in any street or locality of said city, a sufficient construction of conduits or subways underground shall be made ready under the provisions of this act, reference being had to the general direction and vicinity of the electrical conductors then in use overhead, the said board shall notify the owners or operators of the electrical conductors above ground in such street or locality to make such electrical connections in said street, or through other streets, localities, or parts of the city, with such underground conduits or subways so specified, as shall be determined by the said board, and to remove poles, wires or other electrical conductors above ground, and their supporting fixtures or other devices, from said street and locality, within ninety days after notice to such effect shall be given. This provision is made a police regulation in and for the city of New York; and in case the several owners or operators of such wires, and the owners of such poles, fixtures or devices, shall not cause them to be removed from such street or locality, as required by such notice, it shall be the duty of the commissioner of public works of said city to cause the same to be removed forthwith by the bureau of incumbrances, upon the written order of the mayor of said city to that effect." By the fourth section of said act it is provided that "it shall be unlawful, after the passage of this act, for any corporation or individual to take up the pavements of the said streets of said city, or to excavate in any of said streets for the purpose of laying underground any electrical conductors,

unless a permit in writing therefor shall have been first obtained from the said board, or its predecessor ; and, except with such permission, no electrical conductors, poles or other figures or devices therefor, nor any wires, shall hereafter be continued, constructed, erected or maintained, or strung above ground, in any part of said city. The said board of electrical control may establish, and from time to time may alter, add to or amend, all proper or necessary rules, regulations and provisions for the manner of use and management of the electrical conductors, and of the conduits or subways therefor, constructed or contemplated under the provisions of this act, or of any act herein mentioned.

In substance, the court is asked upon this motion to determine that the opinion which the board of electrical control had formed as to the feasibility of putting the electrical wires under the streets and avenues specified in the resolution of September 21, 1887, is an erroneous one ; and it is asked to substitute its own opinion for that of the board. In other words, the court is asked to override the will of the people, as expressed in the act of 1887, that the board of electrical control shall decide when and where, and in what manner, the wires shall be placed underground. On plain principle, this request must be refused. See 2 High Inj., pp. 813-815, § 1240, where the learned author says: "And no principle of equity jurisprudence is better established than that courts of equity will not sit in review of proceedings of subordinate political or municipal tribunals, and that, where matters are left to the discretion of such bodies, the exercise of that discretion in good faith is conclusive, and will not, in the absence of fraud, be disturbed ; and the fact that the court would have exercised the discretion in a different manner will not warrant it in departing from the rule. * * * And where municipal officers are proceeding in the exercise of an unquestioned authority, with the construction of a work of public convenience, they will not be enjoined, at the suit of a citizen seeking to restrain the work upon the particular plan

proposed, upon the ground that another and different plan is superior. Thus the owner of mills and mill privileges upon a river in an incorporated city will not be permitted to enjoin the city authorities from improving or reconstructing a public bridge in accordance with a proposed plan, upon the ground that the plan adopted will cause more injury to the complainant's mills than would otherwise accrue, since the power to make the improvement necessarily implies the right to determine upon the plan and method of doing it." See, also, *People v. Contracting Board*, 27 N. Y. 378-381; *Howland v. Eldredge*, 43 N. Y. 457; *People v. Fairchild*, 67 N. Y. 334; *People v. Leonard*, 74 N. Y. 443; *People v. Common Council*, 78 N. Y. 33-39. It is essential that the board, in arriving at a determination, should be free to act upon the various plans submitted to it, untrammelled by the views and opinions of other officers and departments of the government, and no court should intervene for the purpose of retarding, arresting or preventing the action of the board, except in cases where fraud, or conduct amounting to fraud, is shown. There are allegations in the moving papers which are intended to show that the board of electrical control has been actuated in its proceedings, as respects the plaintiffs, by improper motives; but, after a full consideration of the attacking and replying affidavits, I do not think that the charge is sustained. On the contrary, while all charges of fraud or collusion are denied by the defendants, no one, I think, can read the plaintiff's papers without receiving the impression that the plaintiff has determined from the first not to submit to the orders of the board in respect to the placing of the wires under ground, unless some plan was adopted by the board which would be satisfactory primarily, not to the board, but to the plaintiff. So far as the expert testimony is concerned, I deem it sufficient to say that, while the plaintiff has produced the affidavits of many electricians of undoubted capacity and standing, who are of the opinion that the plan adopted by the board of electrical control is not feasible or practicable, the defendants

have read in answer numerous affidavits from electricians, both practical and theoretical, of equal standing and experience, indorsing and commending that plan. Upon this state of facts the wisdom of the Legislature, in confiding to the board the exclusive power to determine upon a proper plan for placing the electric wires under ground, is apparent. See remarks of RUGER, C. J., in *People v. Squire*, 107 N. Y. 605.

It was contended upon the argument that the act of 1887 is in conflict with the Constitution of this State. Some of the grounds which are urged are the same as those alleged against the acts of 1884 and 1885, and are disposed of by the decision of the Court of Appeals in the case of *People v. Squire, supra*. Indeed, the opinion of the court in that case is a conclusive answer to most of the points made upon this motion. It is there decided that the act of 1885 is not in conflict with section 17, art. 3, of the Constitution, because it declares that the act of 1884 is amended so as to conform to the provisions of the act of 1885; the former act not being inserted in the latter. It is also decided that the act of 1885, so far as it affects corporations organized before its passage, is not obnoxious to the constitutional prohibition against laws impairing the obligations of contracts; that it does not annul, destroy, or materially impair or restrict, any franchises or contract rights previously secured, but seeks to regulate and control their exercise, so that they shall cease to constitute a public nuisance. At page 603, 14 N. E. Rep. 823, Chief Justice RUGER, in delivering the opinion of the court, says: "But we are of the opinion, for other reasons, that this legislation did not, and was not intended to, materially impair or restrict the enjoyment of the franchise secured by the relator. The necessity of these acts springs out of a great evil, which in recent times has grown up and afflicted large cities, by the multiplication of rival and competing companies, organized for the purpose of distributing light, heat, water, the transportation of freight and passengers, and facilitating communication between distant points, and which require in

their enterprises the occupation, not only of the surface of and air above the streets, but indefinite space under ground. This evil had become so great that every large city was covered with a net-work of cables and wires attached to poles, houses, buildings and elevated structures, bringing danger, inconvenience and annoyance to the public. Extensive spaces under ground were also required to lay pipes and build trenches and arches to transact the business of the various corporations requiring them. These works not only called for great skill to harmonize the various and conflicting claims of competing companies to rights above as well as beneath the ground, but a comprehensive plan and supervision to prevent the constant disruption of the streets and the interruption of travel. The necessity of a remedy for these public annoyances had long been felt, and it finally culminated in the enactment of the several statutes referred to. These statutes were obviously intended to restrain and control, as far as practicable, the evils alluded to, by requiring all such wires to be placed under ground in such cities, and to be subject to the control and supervision of local officers, who could reconcile and harmonize the claims of conflicting companies, and to obviate in some degree the evils which had grown to be almost, if not quite, intolerable to the public. The scheme of these statutes was not to annul or destroy the contract rights of such companies, but to regulate and control their exercise. They did not purport to deny them any privileges theretofore granted, but they did require that they should be exercised with due regard to the claims of others, and in such a way that they should cease to constitute a public nuisance, and should be enjoyed in such a manner as to inconvenience and endanger the general public as little as possible."

The act of 1887 was not considered by the Court of Appeals in *People v. Squire*, but the reasoning, which goes to show that the former acts were not unconstitutional, is equally forcible to sustain the validity of the latter act. Precisely why the plaintiff in this case can challenge the

unconstitutionality of the act of 1887, because it seeks to validate the contract theretofore made by the subway commissioners, I do not understand. It was competent for the Legislature, in the first instance, to have authorized the subway commissioners to make the contract in question; and it seems to me that, if the contract was beyond the power of the commissioners when made, the Legislature could afterwards affirm and ratify it. *Brown v. Mayor, etc.*, 63 N. Y. 244, and cases cited. If, however, there is any reason for doubting that the act of 1887 is constitutional, the doubt is so remote that a justice, sitting at chambers, would not, upon well-established authorities, be justified in entertaining it. *In re Railroad Co.*, 70 N. Y. 342. In that case EARL, J., referring to certain constitutional objections to the general rapid transit act, says: "In considering them we must keep in view the salutary rule, often reiterated, that nothing but a clear violation of the Constitution will justify a court in overruling the legislative will. Every statute is presumed to be constitutional, and every intendment is in favor of its validity." See also *Thompson v. Commissioners*, 2 Abb. Pr. 248; *Electric Lines Co. v. Crimmins*, N. Y. Super. Ct., opinion by FREEDMAN, J.; *In re Lexington Avenue*, 63 How. Pr. 462; *People v. Tweed*, 63 N. Y. 206.

It is further contended by the plaintiff that an unjust discrimination is being made by the board of electrical control between the plaintiff and other companies engaged in the business of electric lighting in the city of New York. The allegations to that effect in the plaintiff's affidavits, I am constrained to say, are, in my opinion, fully met and answered; but if they are not, the remedy of the plaintiff is not by injunction. Section 7 of the act of 1887 provides for such a case, and by that section, if the plaintiff is aggrieved, it can by *mandamus* compel the board to "furnish just and equal facilities" to it, and obtain precisely the same rights as any other corporation or corporations. It is not necessary, to obtain these rights, that an injunction should be granted to

the plaintiff, which may entirely thwart all the efforts of the board in the matter of putting the electric wires underground.

There is nothing in the motion to punish the defendants for contempt which calls for particular observation. The affidavits of the defendants explain, as I think, very satisfactorily, the acts which are alleged to have been in violation of the injunction and of the plaintiff's rights, and do not, as thus explained, call for the condemnation of the court.

Finally, I am of the opinion that the whole equity of the plaintiff's case is met, denied and answered by the defendant's papers, and I therefore see no reason for interposing the strong arm of the court to arrest the progress of a great public work, the speedy completion of which is desirable for the safety and convenience of the people.

NOTE.— See note to *W. U. Tel. Co. v. Mayor of New York*, *post*.

THE WESTERN UNION TELEGRAPH COMPANY v. THE
MAYOR OF THE CITY OF NEW YORK ET AL.

U. S. Circuit Court, Southern District of New York, April 15, 1889.

(38 Fed. R. 552.)

NEW YORK SUBWAYS ACTS.—INTERSTATE COMMERCE.—POST-ROADS ACT.

The New York subways acts (laws 1884, ch. 534; laws 1885, ch. 499, and laws 1887, ch. 716) providing that after a certain period all electrical wires in the city of New York shall be laid underground, and auxiliary to that purpose are valid, as police regulations; the police power being inherent in the States and not affected by the interstate commerce provisions of the United States Constitution nor by the post-roads act of Congress of July 24, 1866.

The act of 1887, ratifying the contract of the subway commissioners with the Consolidated Subway Co., by which the latter was to lay subways, subject to the supervision of the commissioners, for the use of all the electrical companies. and to charge rental therefor, does not deprive

Telegraph Co. v. Mayor et al.

said companies of their easements for the benefit of the subway company ; nor does it seem to violate that provision of the N. Y. State Constitution which forbids the Legislature to pass a local bill granting any corporation an exclusive privilege, immunity or franchise.

So far as these statutes authorize the removal, by the commissioners, of wires strung upon the elevated railroad structure, which is an independent post-road, their validity is doubtful, and an injunction is proper to restrain interference therewith until the questions can be decided by the court of last resort.

Cases of this series cited in opinion : *Pensacola Tel. Co. v. W. U. Tel. Co.*, vol. 1, p. 250 ; *W. U. Tel. Co. v. Massachusetts*, ante, p. 57 ; *People v. Squire*, ante, p. 176.

IN equity. Application for injunction restraining the board of subway commissioners of New York city from interfering with the complainant's poles and the wires strung upon them ; also with its wires strung upon the structure of an elevated railway.

Wager Swayne, George H. Fearons and Rush Taggart, for complainant.

John M. Bowers and David J. Dean, for defendants.

WALLACE, J. : This case presents the general question whether certain acts of the municipal authorities of the city of New York, respecting matters of grave local concern, done or about to be done pursuant to powers devolved upon them by the Legislature of the State, are such an invasion of the paramount authority of the national government as to render them unwarranted. The mere statement of this proposition shows that the complainant has properly invoked the jurisdiction of this court, and has a right to rely upon its interposition by injunction, if the acts of the defendants are thus unwarranted, are injurious to the complainant, and are of a nature remediable by courts of equity. Telegraph companies that have accepted the restrictions and obligations of the law of Congress of July 24, 1866 (title 65, Rev. St. U. S.), become, as to government business, agencies of the general government, and are given the privilege to "construct, maintain and operate" lines

of telegraph over and along any post-road of the United States, but not so as to interfere with "the ordinary travel" on such roads. All the streets of the city of New York are post-roads, because they are letter carrier routes; and all railroads are post-roads. Rev. St. § 3964. The complainant accepted the provisions of this law of Congress in 1867. A telegraph company occupies the same relation to commerce, as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. Telegraph companies are subject to the regulating power of Congress in respect to their foreign and interstate commerce, and this power resides exclusively in Congress. The complainant has long been engaged in interstate and foreign commerce. In the course of its operations the complainant has lawfully erected its poles, and strung its wires, in and along many of the streets of New York city, which, as has been stated, are post-roads of the United States, and it has also put up and now maintains over and along other streets a number of wires upon the structures of the Manhattan Railway Company, an elevated railway of the city, also a post-road, pursuant to a lease from the railway company. The defendants, assuming to proceed by the sanction and mandate of certain acts of the State Legislature, have compelled the complainant to remove its poles and wires from some of the streets, and have notified it to remove them from other streets, and to remove its wires from the structures of the elevated railway; and they propose, if the complainant fails to comply with these requirements, to remove the poles and wires themselves. Under these circumstances the complainant asks this court to examine the authority under which this destruction of its property is threatened, and determine whether there is any justification in law for acts which apparently invade its privilege to maintain and operate its lines upon the post-roads of the United States, interfere with its operations as a government agent, and interrupt and impede the discharge of its functions as an instrument of interstate and foreign commerce.

It is not open to discussion that the complainant is protected by the national authority against any encroachment under State authority upon the rights and immunities expressly granted to it by the act of Congress, or which it enjoys in its dual capacity as an agent of the general government and an instrument of interstate and foreign commerce. Speaking of the privilege conferred upon telegraph companies by the act of Congress, the Supreme Court of the United States, in *Telegraph Co. v. Telegraph Co.*, 96 U. S. 1, 11, used this language :

“It gives no foreign corporation the right to enter upon private property without the consent of the owner, and erect necessary structures for its business ; but it does provide that, whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.”

Indeed, the language of one of the very latest opinions of that court upon the question of the power of the State to interfere with the right of a telegraph company to maintain and operate its lines along a post-road applies to the specific facts of this case, and, if literally interpreted, would control the present decision. The question before the court was as to the power of a State to tax the real and personal property, within the State, of a telegraph company which had accepted the provisions of the act of Congress ; but the court, while holding that the privilege granted did not exempt the telegraph company from such taxation, said :

“While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company, receiving the benefit of the laws of the State for the protection of its property and its rights, is liable to be taxed upon its real or personal property as any other person would be.” *Telegraph Co. v. Massachusetts*, 125 U. S. 530, 548 ; 8 Sup. Ct. Rep. 961.

Concerning the immunity of the complainant, as an agent

of the general government for the transaction of government business, from an unwarranted interference through State legislation with its operations, the doctrine first enunciated in *McCulloch v. State*, 4 Wheat. 316, and reiterated in subsequent adjudications whenever the question has arisen, is familiar, that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the agencies of the Federal government, and they are exempted from the effect of State legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve the government. Respecting the position of the complainant as an instrument of interstate and foreign commerce, it suffices to quote the language of the Supreme Court in one of the more recent cases in which the question was considered :

“Notwithstanding what is there said [in previous judgments], this court holds now, and has never consciously held otherwise, that a statute of the State intended to regulate, or to tax, or to impose any other restriction upon the transmission of persons or property or telegraph messages from one State to another, is not within that class of legislation which the States may enact in the absence of legislation by Congress, and that such statutes are void even as to that part of such transmission which may be within the State.” *Railway Co. v. Illinois*, 118 U. S. 557; 7 Sup. Ct. Rep. 4.

Nevertheless, persons and corporations enjoying grants and privileges from the United States, exercising Federal agencies, and engaged in interstate commerce, are not beyond the operation of the laws of the State in which they reside or carry on their business; and it is only when these laws incapacitate or unreasonably impede them in the exercise of their Federal privileges or duties, and transcend the powers which each State possesses over its purely domestic affairs, whether of police or internal commerce, that they invade the national jurisdiction. This doctrine is well expressed in the words of the Supreme Court in *Patterson v. Kentucky*, 97 U. S. 501, 504, as follows :

“By the settled doctrines of this court the police power extends at least to the protection of the lives, the health and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense of the Constitution, necessarily intrench upon any authority which has been confided, expressly or by implication, to the national government.”

The statutes which the defendants are proceeding to enforce unquestionably belong in the category of police regulations, the power to establish which has been left to the individual States. But statutes of this class may sometimes trench upon the Federal jurisdiction; and when their provisions extend beyond a just regulation of rights for the public good, and unreasonably abridge or burden the privileges which the national authority conserves, they cease to be operative. The State, when providing by legislation for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government. *Mugler v. Kansas*, 123 U. S. 623, 663; 8 Sup. Ct. Rep. 273. In *Morgan v. Louisiana*, 118 U. S. 462; 6 Sup. Ct. Rep. 1114, the Supreme Court say:

“In all cases of this kind it has been repeatedly held that when a question is raised whether the State statute is a just exercise of State power, or is intended by roundabout means to invade the domain of federal authority, this court will look into the operation and effect of the statute to discern its purpose.”

And again the court say (page 464):

“For, while it may be a police power in the sense that all provisions for the health, comfort and security of the citizens are police regulations and an exercise of the police power, it has been said more than once in this court that, even where such powers are so exercised as to come within

the domain of Federal authority, as defined by the Constitution, the latter must prevail.”

Applying these principles, it is now to be considered whether the statutes in question, or the acts of the defendants under them, can be defended under the State power of police regulation, or whether what is proposed to be done exceeds in any respect the boundaries of legitimate regulation, and encroaches upon the rights of the complainant founded upon the law of Congress, or incidental to the nature of its commerce. By chapter 534 of the laws of 1884 it was enacted, in effect, that all electric wires and cables in any city having a population of 500,000 or over should be placed under the surface of the streets, and the persons controlling the same should by a specified date have the same removed from the surface; and the local governments of such cities were authorized to remove such wires and cables wherever found above ground in case the owner failed to comply with the provisions of the act. By chapter 499 of the laws of 1885 a board of commissioners of electrical subways was created for such cities, and charged with the duty of enforcing the provisions of the previous act, and power was conferred upon them to devise and make ready a general plan of underground conduits, and to compel all companies operating electric wires to use the subways so prepared. They were also empowered to allow the wires to remain above ground when compatible with the public interest. In April, 1887, the commissioners for the city of New York entered into a contract with the Consolidated Telegraph & Electric Subway Company to lay subways in the city of New York for use of all the electrical companies when furnished with plans and specifications therefor by the commissioners. This contract authorized the subway company to charge a rental for the use of the subways, and contained provisions reserving such a control in the commissioners over them as was calculated to secure to all companies desiring to use them reasonable facilities and protection. It contained a provision by which all companies occupying space in the subways were to own their own con-

ductors, and have the full management and control thereof, subject to the rights of all other occupants, and to such reasonable rules and regulations as should be made by the commissioners. It also contained a stipulation that the commissioners would use all lawful means to compel all companies to place their conductors in the subways, and pay a fair rental for the use. By chapter 716 of the laws of 1887 the Legislature ratified and confirmed the contract made between the commissioners and the subway corporation; and the act provided that if at any time the agreement should be found inoperative or ineffectual for the accomplishment of its just purposes, the commissioners were empowered to make such new or different contracts with the same or other parties as might be reasonably necessary. The act also contained a provision authorizing an application to be made to the courts for a *mandamus* whenever it appears that the subway corporation or the commissioners have failed to furnish just and equal facilities to any company operating electrical conductors upon just and reasonable terms. By sections 3 and 4 it declared as follows:

“Sec. 3. Whenever, in the opinion of the board hereinbefore constituted, in any street or locality of said city a sufficient construction of conduits or subways underground shall be made ready under the provisions of this act, reference being had to the general direction and vicinity of the electrical conductors then in use overhead, the said board shall notify the owners or operators of the electrical conductors above ground in such street or locality to make such electrical connections in said street or through other streets, localities or parts of the city with such underground conduits or subways, so specified, as shall be determined by the said board, and to remove poles, wires or other electrical conductors above ground, and their supporting fixtures or other devices, from said street and locality within ninety days after notice to such effect shall be given. This provision is made a police regulation in and for the city of New York, and in case the several owners or operators of such wires, and the owners of such poles, fixtures or devices shall not cause them to be removed from such street or locality as required by such notice, it shall be the duty of the commissioner of public works of said city to cause the same to be removed forthwith by the bureau of incumbrances, upon the written order of the mayor of said city to that effect.

“Sec. 4. It shall be unlawful, after the passage of this act, for any corpo-

ration or individual to take up the pavements of the streets of said city, or to excavate in any of said streets for the purpose of laying underground any electrical conductors, unless a permit, in writing, therefor shall have been first obtained from the said board or its predecessors; and, except with such permission, no electrical conductors, poles or other figures or devices therefor nor any wires, shall hereafter be continued, constructed, erected or maintained, or strung above ground in any part of said city. The said board of electrical control may establish, and from time to time may alter, add to or amend, all proper and necessary rules, regulations and provisions for the manner of use and management of the electrical conductors, and of the conduits or subways therefor constructed or contemplated under the provisions of this act, or of any act herein mentioned."

It was said of the acts of 1884 and 1885, by the Court of Appeals (*People v. Squire*, 107 N. Y. 593; 14 N. E. Rep. 820), that they "sprung out of a great evil, which in recent times has grown up and afflicted large cities by the multiplication of rival and competing companies, organized for the purpose of distributing light, heat, water, the transportation of freight and passengers, and facilitating communication between distant points, and which require in their enterprises the occupation of not only the surface and air above the streets, but indefinite space underground. This evil had become so great that every large city was covered with a network of cables and wires attached to poles, houses, buildings and elevated structures, bringing danger, inconvenience and annoyance to the public. * * * The necessity of a remedy for these public annoyances had long been felt, and it finally culminated in the enactment of the several statutes referred to. These statutes were obviously intended to restrain and control, as far as practicable, the evils alluded to, by requiring all such wires to be placed underground in such cities, and be subject to the control and supervision of local officers who could reconcile and harmonize the claims of conflicting companies and obviate in some degree the evils which had grown to be almost, if not quite, intolerable to the public."

The act of 1887, by validating the contract between the commissioners and subway company, in effect incorporated the terms of that contract into its provisions. But the

statute is none the less an exercise of the police power, and within the competency of the Legislature, because of the special privileges given to the subway company.

It has been urged that, in effect, this statute confiscates property rights of the complainant and other companies owning electric wires, by depriving them of their easements for the benefit of the subway company, and therefore cannot be sustained as an exercise of police power. But in the *Slaughter House Cases*, 16 Wall. 36, the Supreme Court upheld a statute far more obnoxious to these objections than the present act. In that case the statute under consideration was one passed by the Legislature of Louisiana, granting to a corporation created by it the exclusive right for twenty-five years to have and maintain slaughter houses, landings and yards for inclosing cattle intended for sale or slaughter within certain parishes of that State, including the city of New Orleans; prohibiting all other persons from building, keeping or having slaughter houses, landings or yards for cattle intended for sale or slaughter; requiring that all cattle intended for sale or slaughter should be brought to the yards and slaughter houses of the corporation; and authorizing the corporation to exact certain fees for each animal slaughtered. This act was sustained as a police regulation by the court.

It has also been objected to the act of 1887 that it contravenes section 16, art. 3, of the State Constitution, prohibiting the Legislature from passing any local bill granting to any corporation any exclusive privilege, immunity or franchise. Without intending to intimate that such a question is properly to be considered by this court in the present case, it is proper to say that the objection seems to be without substance. There is nothing in the contract with the subway company which precludes the commissioners from building subways, or entering into contracts with other companies for building them, similar to the one made with the subway company. The contract only extends to such subways as the commissioners shall direct the subway company to build, and it provides in

express terms that nothing in it shall be construed as granting to the subway company any exclusive privilege or franchise.

The question, then, is whether or not these statutes unreasonably abridge or burden privileges and immunities which the complainant derives from the general government. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and these statutes are to be judged by the extent of the powers which they confer, and treated as police regulations only to the extent to which their operation can be justified by the police power of the State. Undoubtedly, in carrying them into effect, the complainant will be subjected to great expense, the temporary interruption of its business, and possibly to permanent inconvenience and loss in conducting its business. But, after all, the question is merely one of the reasonableness of the regulation, and whether the losses and inconveniences to which the complainant may be subjected are not such as may justly be exacted of every citizen or property owner for the common good. It is a settled principle, "growing out of the nature of well ordered society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." *Com. v. Alger*, 7 Cush. 53. This liability is quite irrespective of the source or character of his title. Thus the owner of a patent for an invention—property which is created and only exists by force of the statutes of the United States—can only enjoy his property "subject to the complete and salutary power—with which the States have never parted—of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few." *Patterson v. Kentucky*, 97 U. S. 501. The subordination of the property rights of the owner to the just exercise of the police power

of the State is as complete as it is to the taxing power of the State, which requires him to contribute his proportion of the burden of taxation. Indeed, the two powers of regulation are co-ordinate and co-extensive, and the limitations upon one may well be ascertained by the limitations upon the other. As is said by the court in *Kidd v. Pearson*, 128 U. S. 1 ; 9 Sup. Ct. Rep. 6:

“The police power of a State is as broad and plenary as its taxing power ; and property within the State is subject to the operations of the former so long as it is within the regulating restrictions of the latter ”

And in a very recent adjudication it has been stated that the property within the State, of a telegraph company, privileged under the law of Congress to maintain and operate its lines over the post-roads of the United States, is subject to the exercise of these two powers. In *Telegraph Co. v. Massachusetts*, 125 U. S. 548 ; 8 Sup. Ct. Rep. 961, the court say :

“It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State to which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support.”

It is not apparent how the regulation proposed impairs in any just sense the privilege granted to the complainant by the law of Congress. The privilege to maintain telegraph wires “over and along” post-roads is not to be construed so literally as to exclude regulations by the State respecting location and mode of construction and maintenance, which the public interests demand, but is to be construed so as to give effect to the meaning of Congress, which was to grant an easement that would afford telegraph companies all necessary facilities, and which to that extent should be beyond the reach of hostile legislation by the States. Thus interpreted, the grant is no more invaded

when the regulation requires the wires to be placed in conduits underground than it would be if they were required to be placed in conduits along the surface of the streets; and when this becomes necessary for the comfort and safety of the community, such a regulation is as legitimate as one would be prescribing that the poles should be of a uniform or designated height, or should be located at given distances apart, or at designated places along the streets. Regulations of an analogous character, and entailing nearly as onerous and expensive burdens upon the property owner, are those by which railroad companies have been compelled to maintain fences and cattle-guards; and in the instances where the competency of such regulations has been considered by the Supreme Court, it seems never to have been suggested that they were an unreasonable interference with the post-roads of the United States, or the agencies of the Federal government, or with the power of Congress to regulate commerce. *Railway Co. v. Humes*, 115 U. S. 512; 6 Sup. Ct. Rep. 110; *Railway Co. v. Beckwith*, 9 Sup. Ct. Rep. 207. The legislation in question does not contemplate any regulation which is not practically feasible; but what is prescribed, if judiciously enforced, can be complied with by the companies operating electric wires without serious detriment to their instrumentalities. The expense, and the temporary or occasional interruptions and inconveniences which are incident to the scheme proposed, constitute the extent of their sacrifice for the general comfort and convenience. Such legislation does not infringe upon the power of Congress to regulate commerce, or upon the exemption of the agencies of the general government from State control.

The reports of the decisions of the Supreme Court abound with cases illustrating the rule that all local arrangements and regulations respecting highways, railroads, bridges, canals, ferries and wharves within the State, their location, supervision and details of management, though materially affecting commerce, both internal and external, and thereby incidentally operating measurably upon the transaction

of interstate commerce, are within the power and jurisdiction of the several States. When the regulations do not act upon the commerce through the local instruments to be employed after coming within the State, but directly upon business as it comes into the State from without, or goes out from within, they are nugatory; otherwise they are valid. The most frequent illustrations are found in the exercise of the taxing power of the State; and the distinction has always been observed, though in many cases the line has seemed obscure, between taxation or regulation of commerce itself, and of subjects which are merely auxiliary. So with respect to State legislation which touches the instrumentalities of Federal agencies. These agencies are exempt from State control by police regulation, or by the exercise of the taxing power, so far only as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve the government. *Bank v. Com.*, 9 Wall. 353; *Railroad Co. v. Peniston*, 18 Wall. 5.

What has thus been said of these statutes has been confined to their effect as authorizing the municipal authorities to compel complainant to remove its poles and wires from the streets to the subways. There is serious doubt whether the powers conferred by these statutes are not nugatory to the extent that they permit the complainant to be deprived of its right to maintain and operate its wires upon the structures of the elevated railway. That railway is an independent post-road of the United States, in legal contemplation, carved out of the streets upon which its structures are erected; and State legislation, under whatever power it may be classified, is impotent to destroy the privilege given by the act of Congress. The power to remove the wires altogether from these structures, and to refuse to permit them to be kept there under any circumstances, is not regulation, but is equivalent to a complete denial of the privilege. Such a power would seem to be as obnoxious to the Federal privilege as that which was attempted to be exercised by the State of Florida in the

statute considered by the Supreme Court in the *Case of Telegraph Co.*, 96 U. S. 1 [*supra.*] The effect of that statute was to preclude a telegraph company from constructing and operating its lines along the railroad of the Alabama & Florida Railroad Company, and to that extent the courts held it to be inoperative. Whether this conclusion is sound or not, inasmuch as the maintenance of the wires of the complainant upon the structures of the railway company is not at present attended with any public inconvenience, and the question is one of sufficient novelty and importance to be considered by the court of last resort, any doubt should be resolved in favor of the complainant, for the purpose of its temporary protection.

It is alleged by the complainant that in proceeding to enforce these statutes the defendants are attempting to compel it to place its wires in some of the subways of the subway company, which are insufficient and defective to a degree that will seriously affect the workings of its wires. It is needless to say that the defendants deny this averment. However the fact may be, the defendants are not acting *mala fide*, and as they are exercising discretionary powers as public officers, which are lawful within the scope of their authority, the exercise of that discretion in good faith will not be reviewed by a court of equity, and their determination is conclusive. The well settled doctrine concerning the exercise of duties by public officers is that, so long as they confine themselves to such as are confided to them by law, the court will not interfere to see whether they are acting wisely or judiciously. *Gaines v. Thompson*, 7 Wall. 347; *Phillips v. Wickham*, 1 Paige, 590; High, Inj. § 1240; 2 Story, Eq. Jur. (13th ed.), § 955. An order will be entered denying an injunction and vacating the stay heretofore granted as respects the removal of the complainant's poles and wires from the streets, and granting an injunction against any interference by the defendants with the complainant's use of the structures of the Manhattan Railroad Company for operating and maintaining its lines.

Brewing Co. v. Telegraph Co.

NOTE.—This case and the two preceding, and the following case, are the earliest decided in this country under statutes providing for the placing of electrical wires in underground conduits, concerning which subject there are statutes in many States, decisions under which will appear in subsequent volumes of this series.

The first statute enacted in New York relative to this subject is, Laws 1884, chap. 534, the full text of which is given in the opinion in the case next following this.

This statute was certainly clear and comprehensive. For the purpose of enforcing its provisions, however, it was found necessary to enact Laws 1885, chap. 499, which created in cities of 500,000 or more inhabitants "Boards of commissioners of electrical subways," and minutely defined their powers and duties. Some measure of discretion was given them as to requiring, in all cases, strict compliance with the law of 1884.

Laws 1887, chap. 716, substituted, in the city of New York, a "board of electrical control" for the board of subway commissioners.

These statutes and the amendments to them apply only to the cities of New York and Brooklyn.

No other city in the State of New York is subject to any subways statute, except Newburgh, the charter of which, as amended by laws 1887, chap. 719, empowers the common council to require all electrical wires to be placed underground, and authorizes all companies or individuals using electrical wires, to place them in conduits under the streets, subject to the regulations and restrictions of the common council.

In addition to the foregoing cases, and the next case, the following have been decided, arising under the New York acts: *East River Electric Light Co. v. Grant*, 57 N. Y. Superior Court Reports, 530; *U. S. Illuminating Co. v. Grant*, 55 Hun, 222; *Armstrong v. Grant*, 56 Hun, 226; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641; *Brush Electric Light Co. v. Consolidated Tel. & Elec. Subway Co.*, 60 Hun, 446; *Manhattan Electric Light Co. v. Grant*, 31 St. R. 254; mem. in 56 Hun, 642. All of which will be reported in this series.

H. CLAUSEN & SONS BREWING COMPANY v. THE BALTIMORE
AND OHIO TELEGRAPH COMPANY.

New York Supreme Court, First Department, Chambers, July, 1884.

(From manuscript.)

TELEGRAPH POLE IN STREET.—ABUTTING OWNER.—POST-ROADS ACT.—NEW YORK CITY ACT OF 1884.

A telegraph company, being organized for purposes of private gain, cannot invade private rights without making compensation.

The city of New York owns only such interest in the land of the streets as is necessary to enable it to control it for street uses.

Brewing Co. v. Telegraph Co.

Abutting owners have a right to the free use of the light, air and access to their land, which they have bought and paid for in paying assessments for street opening; and this not only as to present but also to possible future uses of adjoining land.

A pole five feet in circumference held an obstruction to possible future use of land.

The post-roads act of Congress is subject to the rights of abutting owners and to the police power which a State may exercise directly or authorize a municipality to exercise.

The New York city act of 1884, requiring electric wires to be placed underground, construed and applied.

Case of this series cited in opinion: *Pensacola Tel. Co. v. W. U. Tel. Co.*, vol. 1, p. 250.

MOTION to continue preliminary injunction to restrain a telegraph company from maintaining a pole in a street, claimed to be an obstruction and injury to the rights of the plaintiff, an abutting owner. Further facts sufficiently appear in the opinion.

John E. Rysley, for plaintiff.

Grosvenor P. Lowrey, Edward R. Bacon and Charles Francis Stone, for defendant.

VAN BRUNT, J.: One of the principles which seems to have been decided by the case of *Story v. The N. Y. Elevated R. R. Co.*, is, that corporations organized for the purpose of using public property for private profits are not at liberty to invade private rights without making compensation.

Another principle which also appears to be recognized in that decision is that the corporation of the city of New York is not seized of an absolute fee of the land in the streets of New York, but only of so much of the fee as it is necessary that it should take in order that it might comply with the trust with which it was clothed by the proceedings instituted to devote the land taken to the uses and purposes of a public street.

And also, that abutting owners upon the public streets of the city of New York have a right to the free use of the light, air and access to their land which they have bought

and paid for in the payment of the assessments for benefit, made in the proceedings to open such streets.

The statute of 1813 provides that the city of New York, upon the termination of the proceedings providing for the opening of a public street, shall become seized in fee of the land required for said public streets, *not* absolutely and free from all restraint, but in trust, "that the same be appropriated and kept open for or as part of a public street * * * forever in like manner as the other public streets * * * in said city are and of right ought to be."

The city of New York therefore takes no more of the fee than is necessary to carry out the above trusts.

It is true that it has been claimed, and is still claimed, and that the tendency of judicial decisions for a long time was to hold that the city of New York held the absolute fee to the land embraced within the streets of said city; but it would seem that this doctrine, ignoring as it does all the rights of abutting owners in respect to the uses to which the public streets may be appropriated, and necessarily leading to much injustice and oppression, has been to some extent abandoned, and latterly the courts have examined more carefully into the claim of title to the fee in the public streets in the city of New York, and have been disinclined to follow the broad doctrine heretofore laid down, that abutting owners have no rights in the public streets which it is the duty of anybody to respect.

The use of the public streets of the city of New York by the corporation itself, for the purpose of containing sewers, croton pipes, gas pipes, &c., is entirely consistent with the purposes of the trust under which they hold the streets, as the obligation of the city to supply its inhabitants with water and to light its streets is expressly recognized by the act of 1813.

So also has the duty of the city to protect the buildings therein erected from fire for a long period of time been established.

The use of the streets therefore for any of these purposes

by the city is simply the carrying out of the duty imposed by law, and the placing of water pipes, sewer, gas pipes, &c., under the street, and lamp posts and telegraph poles for the purposes of the fire telegraph is the using of the best means now known for the purposes of fulfilling these obligations resting upon the municipal government.

It is urged in the case at bar that the telegraph pole does no injury whatever to the land of the plaintiffs, in that it does not obstruct the light, air or access to any portion of the building now erected upon the land owned by the plaintiffs.

This may be entirely true, but it is no answer to the present application. As has been above stated, the abutting owner has an absolute interest and right to the light, air and access to his premises arising from the opening of the street upon which his premises abut, and which he has bought and paid for, and no person has the right to interfere with such light, air or access, not simply in respect to the building which may be now upon the premises or in respect to the use to which the premises may now be applied, but in respect to any building which such abutting owner may see fit in the future to erect upon said premises or in respect to any use to which he may apply them.

If, therefore, the pole in question would interfere with or obstruct the light, air or access to any building which the abutting owner might erect, or render more difficult the access to the premises under any use to which they might be applied, such owner is entitled to claim that the pole shall not be erected until proceedings have been instituted to acquire the right so to do.

The question is, therefore, does this pole constitute such an obstruction? There can made be but one answer to this question, it seems to me.

This pole is nearly five feet in circumference and would undoubtedly interfere with the approach to the abutting land, in case the owner desired to make his entrance opposite the position of the pole, as he has a right to do.

It would be an impediment which would be productive of great inconvenience and would be a direct invasion of the right of free access. The plaintiff, therefore, has the right to claim compensation for the injury which he sustains by the erection of this pole, and which the defendant has no right to put up until it has acquired the privilege according to law and make compensation for the injury inflicted.

It has been urged that because the Second avenue is a post-road, and because Congress has authorized the construction of telegraph lines over and along any of the post-roads of the United States, that therefore neither the abutting owners nor the people of the State of New York have any right to interfere with the construction of the defendant's line, and we are cited to the case of *Pensacola v. W. U. Tel. Co.*, 96 U. S. 1., as an authority to sustain this proposition.

The case in question expressly recognized the rights of the owners of the land over which the telegraph is proposed to pass, and only decides that a statute of a State so far as it grants to one telegraph company the exclusive right of establishing and maintaining lines of electric telegraph within the State is in conflict with the acts of Congress relating to the use of telegraph lines for postal, &c., purposes, and therefore inoperative against a corporation of another State entitled to the privilege which that act confers. This case now here decides that the rights of the owners of the land can not be interfered with without their consent or compensation.

It is necessary to consider now another point raised, and that is, under the act of 1884 are the defendants bound to put their wires underground?

It was strenuously urged upon the argument of this case that it was impracticable for a telegraph company to successfully operate its lines if placed underground.

With that question I do not think this court has anything to do. If the Legislature was of the opinion that these wires could and should be placed underground, then it is the duty of the court to enforce the law, and not

attempt its repeal and thus continue what has been considered by the legislature an abuse which should be stopped. It is urged that under the act of 1884 nothing is required except that all wires shall be underground by the 1st of November, 1885, and that it was not intended to interfere with construction above ground until that time.

The act is short and is as follows :

“Section 1. All telegraph, telephone and electric light wires and cables, used in any incorporated city of this State having a population of five hundred thousand or over, shall hereafter be placed under the surface of the streets, lanes and avenues of said city.

“Sec. 2. Every corporation, association or person owning or controlling telegraph, telephone, electric or other wires or cables, including what is known as telegraph poles and other appurtenances thereto, shall, before the first day of November, 1885, have the same removed from the surface of all streets or avenues in every such city of this State.

“Sec. 3. In case the owners of the property above enumerated shall fail to comply with the provisions of this act, within the time herein specified and limited, “the local governments” of the said cities of this State shall then, and they are hereby directed to remove, without delay, all telegraph, electric light, and such other wires, cables and poles, wherever found above ground, within the corporate limits of their respective cities.

“Sec. 4. No city in this State shall grant any exclusive privilege or franchise under this act to any corporation or individual by which a monopoly may be created or competition prevented upon equal terms.

“Sec. 5. This act shall take effect immediately.”

The first section, it will be seen, says that all telegraph, &c., wires shall hereafter be placed under the surface of the streets.

The next section provides that every corporation, &c., owning or controlling telegraph, &c., wires, shall, before the 1st day of November, 1885, have the same removed from the surface of all streets.

It is claimed by the defendants that the word “hereafter” contained in the first section refers to the date fixed in the 2nd section of the act, viz., November 1st, 1885, and not to the time of the passage of the act.

Construing the act according to the evident intention of the Legislature, and so as to give force and effect and harmony to all its provisions, necessarily leads, it seems to me, to a different interpretation.

The Legislature intended that large cities should be freed from the nuisance of having their streets encumbered and disfigured by immense poles, crowded with wires and cables, and it therefore provided that "hereafter," viz., from and after the passage of the act, all telegraph, &c., wires should be placed under the surface of the streets. In other words, from and after this date, no new construction of telegraph lines shall be permitted above the surface.

In the second section they give until November 1st, 1885, for the owners of wires already constructed above the surface to remove them and place them underground.

If it was not supposed that this act had some office to fill at once, why was the fifth section added, which reads as follows: "This act shall take effect immediately."

There seems to be no way of applying the provisions of the 5th section, if the first section does not go into effect until Nov. 1st, 1885.

Therefore, considering the evident intent of the Legislature and the evils which they sought to remedy, but one construction can be placed upon the language of the act, which is, that no wires should be put above the surface of the streets after the act became a law, and that all wires then existing above the street should be removed prior to November 1st, 1885.

It would not seem, however, that this act was intended to interfere with any of the appliances of the municipal government used for the complying with the duties and obligations imposed upon such government, such as the lighting of the streets, the protection of the city from fire, &c., but that corporations organized for private profit should not be allowed to continue to disfigure and obstruct the public streets as they had heretofore done.

The claim that the act of Congress authorizes the construction of telegraph wires over post-roads, and therefore the Legislature has no power to interfere, seems to me to carry Federal authority far beyond any point which the

most confirmed believer in centralization has yet had the hardihood to claim.

Such a doctrine would take away from the government of every State all police control over any portion of the streets and avenues of any city, all of which are letter carriers' routes and therefore post-roads. The general government would have the right to use and obstruct in any manner they saw fit each and every of such streets, and the State authorities would be powerless to protect its citizens from this invasion of their rights.

It is true that Mr. Justice FIELD, in his dissenting opinion in the *Pensacola Case* above referred to claimed that such would be the logical result of the decision of the court in that case, but I fail to see that such consequences follow that decision, as all that was decided in that case was, that the State could not give exclusive authority to one telegraph company to construct its telegraph lines in the State, so as to exclude another company, which had acquired the consent of all property owners to be affected, and which had availed itself of the postal laws, from constructing its lines in the State, a very different thing from holding that the State had no right to regulate the manner of construction of all telegraph lines within the State so that they should do the least damage to public or private interests.

If Congress, under the guise of regulating commerce, has the right to authorize the construction of a telegraph line over the streets of any city, freed from all State or municipal control, then it has also the power to authorize the construction of a railroad through the streets of any city, utterly destroying their use for municipal purposes, provided such railroad proposes to pass from one State to another and is to be used for postal purposes. I imagine that no such power will be held to reside in the general government, certainly not until much greater progress towards centralization has been made than has hitherto been done.

I am of the opinion, therefore, that the pole in question does obstruct the access to the plaintiff's land, and that the

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defendant has no right to maintain it, until it has acquired the privilege by proceeding according to law and making compensation; and that since the passage of the act of 1884, no corporation organized for private profit has had any right to construct any telegraph lines above the surface of any street in the city of New York. As in my opinion the defendants have no right whatever to construct their lines as they are now attempting to do, I do not think it a proper case for the taking of a bond and the dissolution of the injunction.

The motion to continue the injunction must be granted, with \$10 costs, to abide the final event.

NOTE.—For the opinion in this case I am indebted to the courtesy of Roger Foster, Esq., of the New York city bar.

See note to *Mt. Adams & Eden Park Inclined Ry. Co. v. Winslow*, post.

See INDEX to this and to previous volume, titles, "Poles and Wires in Streets; Rights of Abutting Owners." "Post-roads Act."

See note to preceding case.

CHARLES J. ROAKE v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY ET AL.

Court of Chancery of New Jersey, Feb. 13, 1886.

(41 N. J. Eq. 35.)

POLES IN STREETS.—RIGHTS OF ABUTTING OWNER.—INJUNCTION.

Whatever may be the right of a city to authorize the placing of poles and stringing wires in its streets for telephone and telegraph purposes, without consent of or compensation to abutting owners, held that the mere threatened stringing of wires without erection of poles, does not constitute such irreparable injury to the abutting owner as to warrant the issuing of a preliminary injunction.

Case of this series cited in opinion: *Pierce v. Drew*, vol. 1, p. 571.

BILL for preliminary injunction. Facts stated in opinion.

Cortlandt Parker, for complainant.

Wallis & Edwards, for Bayonne.

M. Eggleston, of New York, for the company.

THE CHANCELLOR: The complainant is the owner of a lot of land on Avenue E, in the city of Bayonne, and the bill is filed to restrain the telephone and telegraph company from erecting its poles upon the land in the avenue, between the front line of his lot and the middle of the avenue, and from stretching its wires over that land upon its poles. The bill states that the land in the avenue was dedicated to public use while the place was under township government and before the city was incorporated; and it claims that the fee in the before-mentioned land in the avenue in front of the complainant's lot to the middle of the avenue, is in him.

The company is acting under an agreement with the city, by which the latter, in consideration of \$1 and certain covenants and agreements on the part of the former, gives to it license to erect poles and stretch its telephone wires on and along certain designated avenues and streets of the city, including Avenue E; but the agreement, among other things, provides that the company shall get permission from the land owners before putting down poles in front of their lots. In consideration of the license, the company agrees to furnish certain telephone facilities to the police and fire departments of the city. It appears that the company does not propose to erect poles on the land claimed by the complainant, but does propose to stretch its wires above that land, upon poles set at each side of it but not upon it. The present application is for a preliminary injunction. To warrant the court in issuing such interlocutory prohibition the right of the complainant must be clear. The defendant insists that the city not only had the right to authorize the company to put its poles in the avenue and stretch its wires thereon, but was under legal obligation to do so, because the act of 1880, entitled "A supplement to

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an act entitled 'An act to incorporate and regulate telegraph companies,' approved April 9, 1875," provides that whenever any telegraph or telephone company, organized under the original act or by virtue of any special act, shall apply to the common council or other legislative body of any incorporated city or town through which it is intended to construct its telegraph line, for a designation of the streets in which the posts or poles of such company may be erected, it shall be the duty of such common council or legislative body to give to such company a writing, designating the streets in which the posts or poles shall be placed, etc. *P. L. of 1880, p. 201.* The city claims that it has the right to use the streets for the purpose of telegraphic or telephonic communication; that such use is part of the public uses to which the streets of a city may lawfully be put by the city authorities, without the consent of the owners of lots abutting on the streets, or making compensation to them. It has been so adjudged in Massachusetts. In *Pierce v. Drew*, 136 Mass. 75, it was held that the appropriation of a public highway for the use of a line of electric telegraph, by the erection of poles thereon and stretching wires upon the poles above the surface of the ground, does not impose an additional servitude; and that a statute authorizing such use is constitutional, although it does not provide for compensation to the owner of the fee of the highway. The Legislature of the State appears to have considered that the use of the street, so far as the wires are concerned, was not a violation of the rights of the owner of the soil in the street; for, while it recognizes such rights as to the erection of poles, it does not do so as to the wires. It is laid down that if telegraph posts be erected within the limits of a street or highway without legislative authority, they are nuisances; but that if the erection be thus authorized, they are not. 2 *Dill. Mun. Corp*, § 552. In the case in hand the company does not, as before stated, intend to erect poles on the land in front of the complainant's lot, but means merely to stretch its wires along the front, at least twenty-five feet above the ground, on poles erected on

adjacent or neighboring property. The present injury from such use cannot be great. It certainly is not so great as to warrant a preliminary injunction. A preliminary injunction will never be ordered, unless from the pressure of an urgent necessity. The damage threatened to be done, and which it is legitimate to prevent during the pendency of the suit, must be, in an equitable point of view, of an irreparable character. And a complainant is not in a position to ask for such an injunction when the right on which he founds his claim is, as a matter of law, unsettled. *Citizens Coach Co. v. Camden Horse R. R. Co.*, 2 Stew. Eq. 299. The complainant's counsel urges that the act to incorporate and regulate telegraph companies does not include, in its terms, telephone companies. But the supplement above referred to contemplates the organization of telephone companies under the authority of the original act, which speaks of telegraph companies alone. Moreover, the defendant company is organized, as its name indicates and its charter provides, for telegraphic as well as telephonic communication. That the right of the complainant is debatable is quite apparent. The question raised is a most important one. I do not intend to express any opinion at this time upon the merits of the controversy. It is enough, to dispose of the present motion, that the complainant's right is not clear. Nor does any embarrassment in denying a preliminary injunction arise from the fact that the statute inflicts a penalty for destroying, injuring or obstructing a telegraph line after it shall have been constructed under the act; for the prohibition is against such action if wilful and unlawful. If the company has not the right which it claims, its action in the premises will be taken at its peril. It will gain no right by the refusal of this court to prohibit it at this stage of the suit, and this court will be able to protect the complainant in his rights. The motion for a preliminary injunction will be denied, and the order to show cause discharged, with costs.

NOTE.—See note to *Mt. Adams & Eden Park Inclined Ry. Co. v. Winslow*, *post*.

HEWETT ET AL. v. THE WESTERN UNION TELEGRAPH COMPANY AND THE DISTRICT OF COLUMBIA.

Supreme Court of Dist. Col., March 8. 1886.

(4 Mackey, 424.)

POST-ROADS ACT.—PRIVATE NUISANCE.—ABUTTING OWNER.—INJUNCTION.

The act of Congress of July 24, 1866, granting telegraph companies complying with certain requirements the right to erect and maintain lines along post-roads, applies to the District of Columbia.

The following predicted injuries to abutting owners held insufficient to warrant injunction against erection of telegraph line:

Such obstruction of entrance to buildings as may be caused by poles 150 feet apart, along the line of the curbstone, at or near the division lines of lots, and never in front of entrances ;

Liability of wires to be blown down and fall on street, also, to disturb sleepers by hissing and singing noise caused by wind ;

Increased danger of fire caused by lightning, and impediment to firemen.

Rules applied :

- (1) While a license from public authority must be so used as not to evade private rights, still private caprices must not be allowed to prevail against public benefits.
- (2) Where the hardship to the defendant from granting an injunction will be much greater than to the plaintiff from denying it, the latter should be left to his remedy at law.

Case of this series cited in opinion : *Gay v. Mut. Tel. Co.*, vol. 1, p. 427.

BILL for injunction restraining the erection of a telegraph line in front of stores, in the city of Washington.

By act of Congress, supplemented by the consent of the commissioners of the district, the telegraph company had acquired the right to place its line in the street, the title to which was in the National government.

Further facts are stated in the opinion.

Wm. A. Cook, H. E. Davis, Warren C. Stone and Oscar Nauck, for complainants.

Hewett et al. v. Telegraph Co. and District of Columbia.

J. Hubley Ashton and Nathaniel Wilson, for the Western Union Telegraph Company, and

A. G. Riddle, for the District of Columbia.

Mr. Justice MERRICK delivered the opinion of the court:

This suit was instituted by five citizens of the District of Columbia, owners of property in the northern part of Seventh street for the purpose of enjoining the Western Union Telegraph Company from erecting a line of telegraph poles along a certain portion of that street. It seems that this company, having for twenty years or more maintained lines of telegraph in the city of Washington, in the month of May last, with a view, as they allege, to diminish the number of overground communications in the city, and to aid and advance themselves towards the ultimate establishment of an entire system of underground telegraphs, applied to the proper authorities of the district for their consent and concurrence in readjusting their lines so that they might lay an experimental line of underground telegraph through certain streets of this city, and in connection with and in fortification of that, to erect a certain partial and temporary line of poles to connect with the underground system, in order to supplement it as a guard against any accidents in the working of the underground system; they alleging and averring that the underground system of telegraphy was yet an experimental one, and that while they desired to keep pace with the full progress of experimental science in that regard, yet, with a due respect to the safety and permanency of their business, it would be rash and unwise and inconsiderate in it to abandon it altogether and to rely exclusively, in the present unsettled state of the art, upon the underground system, interruptions in which, if they should happen to occur, would be of momentous consequence to the commerce of the country, to their business, and to the various interests which are dependent upon the promptness and efficiency of the discharge of the duties of that company.

In the application to the commissioners for permission to

make the change, they indicated that the effect of the change would be to shorten and diminish by some ten or twelve miles the amount of ærial telegraph which they now have in the city, and to that extent that it would be a benefit to the city.

Under these circumstances, it applied for the permit to make the underground connection and to make the change in the overground arrangement along Seventh street, to conform to and to aid the experimental line. Permission was granted by the board of commissioners who have charge and supervision of the regulation and control of the streets of the city of Washington.

In that state of the case, these five complainants, one the possessor of a feed store, one the possessor of a drug store, two the possessors of stove stores, and one the possessor of a hotel, applied to the equity branch of the court to enjoin the erection of the telegraph along the line of Seventh street, upon the ground, first, that it was a public nuisance, and, incidental to the public nuisance, that it was a great private nuisance and inconvenience to themselves. The injunction was granted by the court below and an appeal has been taken to this court.

The respondents justify upon three grounds: First, that they had the lawful authority under the act of Congress of 1866, to erect telegraph poles and telegraph lines in the manner proposed; secondly, that the manner of the erection was prudential in all regards and accompanied with the least possible inconvenience to the public; and thirdly, that there was no damage whatsoever accruing or likely to accrue from the exercise of these facilities to the parties complainant, which would justify the interposition of a court of chancery by means of injunctive relief against a nuisance.

The first and important question, therefore, arising under this state of the case is, was there any authority or right in the telegraph company to use the streets of the city of Washington at all for the purpose of telegraphy? They maintain their authority by virtue of the act of Congress of

24th of July, 1866; and, on the other hand, the complainants, maintain that that act of Congress is in no sense applicable to the District of Columbia, and that whatever authority the defendants had or might have had at any time for the erection or maintenance of lines of telegraph in the city, was to be derived altogether from the joint resolution of Congress approved March 3, 1863, under which they, it seems, had professed at one time to erect certain lines of telegraph. And they maintain that even under that resolution they had no power to maintain any of their lines because they had not conformed to the requirements of that resolution; and that resolution having been a special grant to this defendant, the defendant could not, even if other companies might act under the authority of the law of 1866 — that the defendants could not act upon it because they were limited by the special privileges of the joint resolution of 1863.

Much argument was had upon the doctrine that where there is a special law and a general law, the special law is to go along with the general law, and that whoever has claimed a privilege under the special law cannot come within the terms and provisions of the general law itself. There is no need for the court to criticise very closely or to review the authorities about the respective bearing of special and general laws upon each other in the matter of interpretation; for, after all, those artificial rules which were relied upon in the argument are mere aids of interpretation and not themselves the groundwork of interpretation. The first and cardinal rule in the interpretation of a statute is to look to the statute itself, the meaning, the scope and the object of the statute; and if, upon the face of it, you can gather plainly what was the intention of the Legislature, those incidental rules which are mere aids, to be invoked where the meaning is clouded, are not to be regarded.

Now, what is the act of 1866, and what was the design and purpose of it? Upon its face it calls itself “An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and

other purposes.” Here is a great scheme of progress—material progress—announced by the Legislature. Its purpose “to aid in the construction of telegraph lines” with a view to what? To the largest purposes of government: “To secure to the government the use of the same for postal, military and other purposes;” thus shadowing forth those great necessities which are growing upon us day by day in the exercise of the commercial and postal necessities of this great nation; and with a view to effectuate those ends the Legislature has declared, “that any telegraph company now organized, or which may hereafter be organized, under the laws of any State in this Union, shall have the *right*—not the *privilege*—to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, which may have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States,” etc.

No more plenary power could be embraced within the terms of a statute than is declared upon the face of this statute: “any telegraph company now organized, or which may hereafter be organized, under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph;” with what view? In order, amongst other things, as declared upon the face of the statute, “that telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General;” and further, as is contemplated in the third section, that the United States shall have the privilege at any time after five years to become possessed of and own all these lines for certain ascertained prices, to be determined according to the terms of the statute with a view to the great purposes of government.

Such being the nature, purpose and scope of the statute, does it come within the principle of any sound construction to maintain that a resolution of three years preceding, which gave a special privilege to certain lines of a telegraph company to use the highways, roads, streets and grounds of the District of Columbia—I say, is it consistent with any sound rule of construction of statutes, to maintain that such a statute, with such comprehensive objects, is to be dwarfed with reference to any of these great instrumentalities of commerce by a reference to the resolution of 1863, of three years before, which granted a more restricted privilege to certain telegraph companies to use any of the highways, roads or streets of the District of Columbia, under certain circumstances? Is there anything in the nature of the two acts which requires the general power, contemplating the general good of the nation to be exercised by any company that shall establish itself so as to be a useful instrumentality of the government of the United States, to be dwarfed, by saying that it is narrowed under the privilege of this antecedent resolution, and that the small personal privilege is to stand as a qualification and restriction upon a general statute made in pursuance of a great national and general policy?

It seems to me that it does not require reference to authority; it scarcely requires a momentary appeal to right reason to see that this resolution of 1863 can be in no sense a qualification of the absorbing power granted by the act of 1866. It is perfectly true that where a special statute is in existence and there is a general law also, passed subsequently, that the special statute may be construed and ought to be construed in accord with the general law. But where the general law is all-absorbent, takes up everything and embraces what and more than was, by any possibility, contemplated by the special resolution, it seems, as I say, contrary to right reason to maintain that the general statute can in any sense be qualified or restricted, and that universal right can be dwarfed and narrowed by an antecedent special privilege granted to an individual or to a corporation for a special purpose.

For these reasons it seems that the resolution of 1863 can in no sense qualify the general power and right granted by the act of 1866.

Now, what was that power? To extend its lines over any of the post-roads of the United States. Is not the District of Columbia a part and parcel of the United States, and are not the postal-roads in the District of Columbia within the scope, object and spirit of a law providing for the most extended postal facilities to the people of these United States? Is not the general post-office here the very focus from which all the postal privileges and postal communications are to emanate? Is not the government of the United States entitled, and the citizens of the United States entitled, to the freest and fullest postal facilities into the very heart of the city of Washington? And, therefore, can it be said in any sense of the law, that the District of Columbia shall not be embraced, its postal-roads shall not be embraced, in the contemplation of a general statute, having such a large and beneficial purpose in view? Such an idea has no lodgment in the mind of the court. While this statute is made applicable to this district by the express provision of the law which declares that all laws of the United States not inapplicable are operative within the District of Columbia, yet it may well be put on the broader ground that on the very face of the statute itself, by the necessities of the statute and the contemplation of the law, the District of Columbia was fully embraced within the act of 1866. If so, then, notwithstanding this defendant may have exercised a privilege under the restricted powers conferred by the joint resolution of 1863, it is not debarred from the rights conferred upon every company within the borders of the United States by virtue of the act of 1866.

Having, then, this right, the defendant applied to the Commissioners of the District, who have, under the general law, the power to regulate and control and supervise the use of the streets of the city of Washington, for permission to erect its lines of telegraph upon these certain streets which are indicated. It would have had the

right to erect them, under this law of Congress, without the permission of the Commissioners of the District of Columbia. But, inasmuch as the Commissioners are charged with the supervision of the streets, the control and regulation of them, it was appropriate that they should see that, in the exercise of a right granted by law, there was no infringement of the correlative rights of the public, and that the right, when exercised, should be exercised in due subordination to the rights of others and in conformity to such regulations and prescriptions as should insure the least possible injury to the rights of any individual or the rights of travel and convenience of the general public. It was, therefore, eminently appropriate that application should be made and that this thing should be done in subordination to, and with the consent and approval of, the judgment of the Commissioners of the District of Columbia.

We need not in that aspect of the case, therefore, consider whether the Commissioners would have had the power, independently of the act of Congress, to grant the right to the use of the streets for such a purpose. The right is granted, and all that is contended for on the part of the respondents in this case is, that they shall have the right subject to the reasonable control by the Commissioners of the District, whose duty it is to control the exercise of any right, within the District, under the general police powers which they exert for the public good, in respect of such matters.

That being so, the Commissioners having given their consent, the law of Congress having granted the power, it cannot be said that there can be any public nuisance arising out of the exercise of the grant in the mode proposed on the part of the defendants. The question of a public nuisance is entirely set at rest by the grant of power on the part of Congress and the concurrence of the guardians of the welfare of the public through the instrumentality of the Commissioners of the District.

The question, however, remains: Was there, in the exercise of this right, or in the proposed exercise of

this right, any private nuisance contemplated which should be restrained by the interposition of a court; because it must be conceded that while there may be a grant of authority on the part of the Federal government to use its property, or the grant on the part of any public authority, to use the public property, it must be done always with due regard to the rights of private citizens; and if the right of a private citizen be invaded, it is to stand in just compensation before the tribunals of justice.

No man's right is to be invaded, no matter by what authority or by what power; at the same time no man has a right to set up his caprices so as to prevent the just exercise of rights for the benefit of the public, whether by the public itself or by any private agency which the public chooses to adopt as the instrument for carrying out the purposes of the public welfare.

Before we consider the *gravamen* of the private grievances alleged on the part of the complainants here, it is well enough to see what the general rules of law are which regulate applications for redress of this sort on the part of any citizen who applies for injunctive relief to a court of chancery. We need not go outside of two leading decisions pronounced by the Supreme Court of the United States as to the measure of chancery power in this respect. There has been a great deal said and a great deal written with regard to the extent of injunctive relief, and a great deal of conflict and confusion in decisions in various places. But, happily, as we have the most august tribunal in the world to lay down the rule of action for us, wherever they have spoken it is enough for us to recognize and be governed by what they have said, leaving nice distinctions and complicated rules elsewhere to adjust themselves as they best may under the administration of law not governed and controlled as we are by this one tribunal to which we can resort with so much confidence.

In the second of Black's Reports, in the case of the *Mississippi & Missouri Railroad Company v. Ward*, the rule was laid down by the Supreme Court. That was an application to restrain the erection of a bridge, at Rock

Island, over the Mississippi river. The court used this language, at page 494:

“In the next place: Is the bridge west of the Illinois boundary an unreasonable obstruction, and therefore a nuisance that a court of chancery can lawfully remove? In considering this question we must be governed by the same rule on which a court of law could proceed in case of an indictment against the bridge company for committing the nuisance, and the rule is that if the abridgement of the right of passage occasioned by the erection was for a public purpose, to produce a public benefit, and if the erection was in a reasonable situation, and a reasonable place was left for the passage of vessels on the river, then it is not an unreasonable obstruction and indictable.

“Then, again, the obstruction to navigation must be plainly a nuisance within this rule before it can be removed by decree. If the proceeding was by indictment, and the jury doubted whether the obstruction was a nuisance or not, they would be instructed to acquit the defendant, and so, if this case was referred to a jury to try the fact, and they doubted, they would be bound to acquit. And the same rule applies in a court of chancery where the court ascertains the fact of nuisance.”

That is in regard to a public nuisance where a private party seeks to restrain the injury to himself through an operation of a public nuisance.

In the same volume they also lay down the rule with reference to purely private nuisances, which have not any public aspect at all, and that is done in the case of *Parker v. Winnipiseogee Lake Cotton and Woolen Company*. In a series of resolutions collated by the court, to be found at page 552, they say:

“A diminution of the value of the premises without irreparable injury is no ground for interference.

“Where an injunction is granted without a trial at law, it is usually upon the principle of preserving the property until a trial at law can be had. A strong *prima facie* case of right must be shown, and there must have been no

Hewett et al. v. Telegraph Co. and District of Columbia.

improper delay. The court will consider all the circumstances, and exercise a careful discretion.

“This jurisdiction is applied only where the right is clearly established, where no adequate compensation can be made in damages, and where the delay itself would be a wrong.

“The case must be one of a strong and imperious necessity, or the right must have been previously established at law, the right must be clear, and its violation palpable.

“If the evidence be conflicting and the injury doubtful, this extraordinary remedy will be withheld.

“After the right has been established at law, a court of chancery will not, as of course, interpose by injunction. It will consider all the circumstances, the consequences of such action, and the real equity of the case.”

Now, these are the rules with regard to injunctions that bind the administration of injunctive relief in this court. Apply them to the allegations and the facts in this cause. What are they? I have already shown that the case of the plaintiff acquired no additional force by reason of the allegation of a public nuisance, because the act having been by authority of law, the question of public nuisance is out of the case. Then, how do they stand with regard to the claim for a private nuisance? What are the pretenses which they set up?

In the first place, as I have said, one of the complainants owns a feed store, one owns a drug store, one owns a hotel, and two own stove stores, in a crowded thoroughfare, Seventh street north. Now, what are their allegations? They are to be found in the fourteenth paragraph of the amended bill. It is to be observed that they do not claim on account of their residence; they do not claim on account of private families; there is no allegation of that sort in the amended bill. They have stricken out the second paragraph of the original bill, and in the second paragraph of their amended bill, they simply aver themselves to be the owners and occupants of certain establishments and buildings in the city of Washington, describing

them as applied to the uses which I have just designated. Then in this fourteenth paragraph, they lay down the *gravamen* of the injury of which they complain: "That the said poles, if erected, will seriously and materially interfere with the use of the said portion of the said street and the ordinary travel thereon, and will obstruct and impede the ordinary use and enjoyment by the complainants of their said several premises, and the said portion of the said street, both as a highway and for other purposes for which the same, as contiguous to their said several respective premises, is now properly and lawfully used by the complainants."

Is there anything in that allegation? The poles, as it appears, are to be placed, according to the proof and the sworn answer, at the distance of 150 feet apart along the line of the curbstone and as near as may be upon the dividing line of lots and never in front of the entrance of any house or store along the line of the street. That is the sworn answer, that is the proof and that is the fact.

Now, with that fact staring us in the face, is it not too great an appeal to the credulity of any judicial tribunal to say that the erection of poles at intervals of 150 feet along the line of a street can make any substantial impediment to the entrance of any business place on such street? We have those things, as is matter of public notoriety, all over the city of Washington, all over the crowded cities of New York, Philadelphia, Boston, Baltimore, and the western cities. And we have not been shown any case in which it has ever been held that these telegraph companies have been restrained from the exercise of their business or the erection of their poles upon the ground that they impeded, in point of fact, the access to any business place within any of these cities. And it cannot, in the nature of things, be that they do. A space of twelve inches, which is about the average width of the pole, or fifteen inches, if you please, occupied at intervals of 150 feet, can be no practical impediment to the approach of any man's house along any street of the city.

The next allegation, which is part and parcel of the same, is that it will impede and interfere with the complainants, their families and their customers, in business, in access and approach to, and departure from, the said tenements and premises. How can the entrance to a doorway be largely impeded by a pole twelve inches wide one hundred feet off? And they do not offer any proof, in point of fact, of any such impediment.

Then they say that the "wires proposed to be strung upon the said poles will, if so strung, be liable to be blown down and fall upon the said portion of said street, to the great peril of the complainants, and during the high winds, which prevail in the said city, will create a great and loud hissing and singing noise, to the disturbance of the sleep and quiet of the complainants residing in their vicinity."

This is a prospective and imaginary difficulty, and it may be dealt with sufficiently by quoting the language of the Court of Appeals of the State of Missouri in the case of *Gay v. Mutual Union Tel. Co.*, 12 Mo. App. 491.

"The fears expressed by plaintiff's witnesses that the vibrations of the pole may cause the area wall (which prevented the water in a sewer from getting into plaintiff's cellar) to crack, thus letting water from the sewer into plaintiff's cellar; and that, by reason of its great height, it may be blown down in some unprecedented storm, are mere conjectures of problematical and contingent damage, which is not likely to arise, but which, should it arise, under such circumstances as would impute it to the negligence of defendant, would afford ground for redress in an action at law for damages."

The utterance of that enlightened court is quite a sufficient answer to problematic danger which these complainants allege here with a view to arrest a great work.

The complaint also alleges: "That the said wires will, if erected, seriously and materially increase the danger of destruction of the said tenements and buildings by fire, by their liability to attract lightning, and by their bringing

into proximity to the said tenements and buildings the action of electricity; and that they will also seriously hinder, impede and obstruct the operations of the fire department of the said city in extinguishing any fire or fires that may occur in and upon the said tenements and buildings, and will interfere with access to and escape from the same in case of necessity on account of such fire or fires.”

This completes the enumeration of the grievances that these parties complain of. The answer to it, besides being obvious to the common sense of every man, will be found, if there be need to refer to authority, in the case of *Rhodes v. Dunbar*, 57 Penn. St. Rep. 274, and in the case of *The Mayor of Baltimore v. Radecke*, 49 Md. 228. In this last case there was an application to restrain the erection and maintenance of a carpenter's shop which was run by a steam boiler in a crowded part of the city, where, as the parties alleged, there was a most imminent danger by reason of the combustible materials used there of setting fire to the adjacent property and by enhancing the insurable risks of property on account of this great danger; and that was the point of injunctive relief made by the parties. The Court of Appeals said that the complaint that the business conducted was dangerous, and conducted with combustible materials brought into dangerous proximity to the fire of the boiler of the engine, subjecting their buildings to much hazard and their merchandise to increased danger from fire, raising the prices of insurance and exciting the fears of neighboring owners for the safety and security of their property, were imaginary dangers, and not at all—any one or all of them put together—the occasion for injunctive relief against a legitimate business prosecuted in a legitimate way.

This disposes of each and all of the objections urged in the fourteenth paragraph, so far as they affected the rights of these parties as the foundation for their claim to a court of chancery for injunctive relief. But, assuming that there was some injury, still that injury would not of necessity,

would not of itself justify the application to a court of chancery for relief. As I have said, and as the authorities lay down the rule, the court of chancery will consider all the circumstances and equities of the case ; and where, as a consequence of its interference, the hardship upon one side would be immeasurably greater than the injuries sustained by the other, it will not interpose the extraordinary remedy of injunction, but will leave the complainant to his action at law. It seems to this court that it would be an extraordinary stretch of power to strike down a great commercial agency, to destroy one of the chief instrumentalities of intercommunication in this country, because, peradventure, lightning might be passing along a wire and strike the house of a party who lived near the line of the telegraph, or that it increased the amount of his insurance, or that it made some noise occasionally which excited the nerves of a restless sleeper so that he was made unduly watchful during the hours of the night.

These general views seem to dispose of all the important questions of law in the case, as also they dispose of the special equity set up by the complainants in the cause. In view of everything connected with the case, this court is of opinion that there is no foundation whatsoever for the application which has been made for injunctive relief, and that the bill of the complainants ought to be dismissed with costs.

NOTE.—See note to *Mt. Adams & Eden Park Inclined Ry. Co. v. Winslow*, *post*.

See also INDEX to this volume and vol. 1, titles "Post-roads Act," "Nuisance," "Injunction."

JOHN J. SMITH v. CENTRAL DISTRICT PRINTING AND
TELEGRAPH COMPANY.

Seventh Circuit, Trumbull Co., Ohio, Circuit Court, Nov., 1886.

(2 Ohio Cir. Ct. R. 259.)

TELEGRAPH POLES IN STREETS.—RIGHTS OF ABUTTING OWNERS.

Where abutting owners own to the centre of the highway, the erection of telegraph poles imposes a new servitude, for which compensation must be made.

Cases of this series cited in opinion : *Pierce v. Drew*, vol. 1, p. 571 ; *Board of Trade Tel. Co. v. Barnett*, vol. 1, p. 565.

THE facts appear in the opinion.

Frank Hutchins, for plaintiff.

Jones & Gilmore, for defendant.

WOODBURY, J.: This is an action which comes into this court upon or by appeal from the Court of Common Pleas.

There are three other cases upon the docket which have been submitted with this case, and which are conceded to involve the same questions that are involved in this case, and that the decision of this case shall determine the other three cases as well as this one.

This case was brought into the Court of Common Pleas to enjoin the defendants from constructing their telephone line along and upon the highway in front of the premises of the plaintiff in this action, which are described in his petition. At the time of the commencement of this action, the telephone line was not constructed, although the defendants were engaged in and about to construct a line along the highway in front of the plaintiff's farm. A

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temporary injunction was allowed by a judge of the Court of Common Pleas, and a motion filed by the defendants to dissolve that injunction. Upon a hearing of that motion, the Court of Common Pleas dissolved the injunction, and an appeal was taken to this court from the interlocutory order dissolving that injunction, and ten days were given by the Court of Common Pleas in which the plaintiff was allowed to perfect that appeal, and in the meantime the original injunction which had been allowed was allowed to remain. The appeal, however, was not perfected within the ten days allowed by the court below, and not being perfected, the defendants went on and built and completed their telephone line as contemplated by the defendants, and as it is alleged in plaintiff's petition would be done unless enjoined by the court.

A motion was made in Circuit Court, after the telephone line had been completed by the defendants, to amend the petition; but it was held by this court that an amendment could not be allowed to the original petition, for the case was still pending in the Court of Common Pleas; so the plaintiff went back to the Court of Common Pleas and got leave to amend his petition, and there and then alleged that since the commencement of this action the defendants had gone forward and built and completed their line of telephone along on the highway and upon the premises, as alleged, of the plaintiff, and in front of the farm of the plaintiff.

A further relief was prayed for in the amended petition, to wit, that an order might be issued requiring the defendants to remove the telephone wires and poles so erected, and that the plaintiff might recover damages which he alleges he has sustained by reason of the wrongful erection of the poles and stretching of wires by the telephone company along, upon and over the premises of the plaintiff as alleged.

The plaintiff also alleges in his petition that he is the owner of the fee of this highway along in front of his premises to the centre of the highway and that this line

is constructed upon his said land within the boundaries set forth in the plaintiff's petition.

The defendants deny, or say they have no information upon this question of title by the plaintiff in the highway, and therefore deny the same; but they admit in their answer that for twenty-five years and more there has been a public highway along and in front of the premises of the plaintiff in this action, and that they propose to, and finally admit that they have constructed upon that highway their telephone lines, in pursuance of the law. Evidence has been introduced bearing upon this question, and there is no controversy in this case but the defendants have built and constructed their telephone line along and upon the highway in front of plaintiff's premises, and we have no doubt from the evidence, and from the way and manner that this case has been tried and treated, that the plaintiff in the action holds and owns the fee in the highway to the centre thereof; that this is a mere country or county road in which the public have but a mere easement, while the title in fee remains in the plaintiff—but that may not make any difference in the final result of the case.

The questions which are involved in this case are very important indeed. We have given it a great deal of consideration. We have examined every authority which we could find bearing upon the questions which are involved, and have finally come to a conclusion. The statute of the State, chapter 4, commencing with section 3454, provides that "a magnetic telegraph company heretofore or hereafter created, may construct telegraph lines from point to point along and upon any public road by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires; but the same shall not incommode the public in the use of such road."

Section 3456 provides that "any such company may enter upon any land, whether held by an individual or a corporation, and whether acquired by purchase or by appropriation, or in virtue of any provision in its charter, for the purpose of making preliminary examinations and surveys,

with the view to the location and erection of lines of magnetic telegraph, and may appropriate so much thereof as may be deemed necessary for the erection and maintenance of its telegraph poles, piers, abutments, wires and other necessary fixtures, and for stations, and the right of way over such lands and adjacent lands sufficient to enable it to construct and repair its line." The next provision, or section, provides that "no such company shall, without the consent of the owner thereof in writing, enter any building or edifice, or use or appropriate any part thereof, or erect any telegraph pole, pier or abutment, in any yard or in any enclosure within which an edifice is situate, nor in any cases not provided for in section three thousand four hundred and sixty one, erect any telegraph pole, pier, abutment, wires or other fixtures so near to any edifice as to occasion injury thereto, or risk of injury, in case such pole, pier or abutment be overthrown, nor injure or destroy any fruit or ornamental tree."

The next two sections are provisions providing for appropriation by telegraph companies of the right to construct their telegraph lines upon the railroads of the State, with a limitation providing as to where they may thus appropriate the right to construct, to wit, within the limit of five feet of the outside line, excepting in the cases therein specified. The limitation contained in section 3457 is an exception to cases not provided for in section 3461; that section is a provision for the construction of telegraph lines within municipal corporations, upon any public street, alley or public grounds in any village, etc.

Section 3471 provides that the provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone; and every such company shall have the same powers and be subject to the same restrictions as herein prescribed for magnetic telegraph companies.

It is insisted upon the part of the defendants that under these provisions of the statutes telegraph and telephone companies have the right and power to construct their tele-

graph lines along and upon the highways in this State, whether the adjoining owner shall be the owner of the fee subject to the easement of the public thereon, or whether the fee should be in the public; and that the adjoining owner has no right to complain; that no private property of his is thereby interfered with or is taken, and that no new servitude is cast either upon the fee or upon any rights which the adjoining property owner may hold in the highway—while on the other hand, it is insisted on the part of the plaintiff, that the erection and maintenance of the telephone or telegraph line upon such highway is an additional burden upon the fee, and interferes with the rights of the property owner therein, recognized by the Constitution of the State of Ohio and by the decisions of the Supreme Court of this State, and that they cannot be taken from him without appropriation; and therefore it is that this question is very important indeed to determine what are the rights of the public in the highway, and what are the rights of the adjoining owners, whether the fee be in the public or in the adjoining owners. Certain rights of the adjoining land holder are not controverted in this case, to wit, that the adjoining land owner has all rights in the highway which shall not interfere with the public rights; he is to use the highway in any way or manner which shall not interfere with the public use; he has the right to the herbage growing along and upon the sides of the highway; he has the right to erect thereon his fences; he has the right to erect thereon his hedges; he has the right to dig in the sides of the highway if it in no way interferes with the public use. While on the other hand, the public have the right to devote the use of the highway to any purpose not inconsistent with the rights of the owner and rights of the public therein, or not inconsistent with the objects, purposes and intent of the original appropriation.

There are numerous decisions bearing upon the question as to the uses to which the public may devote the highway; for the purposes of ordinary travel there never could have

been any question, for they were the purposes for which the land was originally dedicated or appropriated for a highway ; and in cities it is well settled that the public may construct sewers in the highway, and may lay water-mains and gas pipes therein, and there is no conflict, so far as we are able to find, in the authorities. It has been held in this State and in Massachusetts, and in several other States, that the public may, on its own account, plank or macadamize a highway ; or that the public may authorize other persons or corporations to plank or macadamize a highway and to take toll thereon, and that such user—it remaining still a highway and devoted to public use—does not cast upon it a new burden for which the adjoining owner should be entitled to compensation ; that it is not such a change in the user as that the adjoining property owner has the right to complain.

Questions have arisen in regard to street railways, as to whether they were an additional burden, and upon this question there is considerable conflict in the authorities in this State. The question came before the Supreme Court, in the 14th Ohio St., the decision being written by Judge RANNEY, and it was held, while the inference to be drawn from the decisions is that if the building of a street railway should inflict no material injury upon the adjoining lot owner, that the public had the right to authorize the construction of a street railway ; but in that case, the court below having found that a street railway was built upon the side of the street ; that it obstructed the right of egress and ingress of the plaintiff to and from his premises ; that it placed the street in such condition that it interfered with his use of the highway along and in front of his premises in going to and from his premises, and in hitching horses upon that side of the street, it was held that his private interest in the highway was interfered with in such way and manner as that the street railway could not construct their road along and upon the highway in the manner contemplated,

without compensation being first made. The court had found below that the plaintiff in that action would be more injured by the construction of the street railway along and upon the side of the street than he would be by the construction of it in the centre of the street. But the court further found, that taking into consideration the interests of the parties, both of the plaintiff and of the defendant company, and of the public, all interests would be as well subserved upon the side of the street as in the center of the street; yet, the court held, notwithstanding, that the property of the plaintiff was interfered with in such way and manner that it could not be taken without appropriation; and in that case, under the order of the Supreme Court, the company was enjoined from the construction of their street railway as contemplated without first acquiring the right either by contract or appropriation. In the State of Massachusetts the same ruling has been held as in Ohio, both in regard to street railways and planks. In New York State there is a conflict in the decisions of its courts which would seem could hardly be harmonized; there is a leading case, *Kerr v. The People*, in the 27th N. Y. Reports, that holds where the fee of the highway or street is in the public, the public may authorize a company to construct its street railways along and upon the highway, and the adjoining lot owners have no such rights interfered with as they have the right to complain, and the theory of the case is, that the adjoining lot owner has no tangible, no visible interest interfered with which could be appropriated.

There is another class of cases, and the rule seems to be as well settled in one as the other. The leading case in the 39th N. Y. State Reports, commencing, I think, on page 504, holds that where the fee of the highway or street is in the adjoining owner, the public have no right or authority to authorize the construction of a street railway along and upon such street against the objection of the owner, and that the company cannot construct in such case its street railway along and upon the highway without first appro-

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priating the right. There were two decisions of that character made by the Court of Appeals of the State of New York, and there were two decisions, upon the other hand, holding that where the fee is in the public, that then a street railroad may be authorized, and the adjoining owner has no right to complain. Now, these cases came before the Supreme Court of Appeals, in the 90th N. Y. Reports, in what is known as the Elevated Railway cases ; in that case the opinion of the majority of the court proceeds upon the ground that the adjoining lot owner, Story, did not own the fee of the street, but had simply an easement therein, and that the fee of the street was in the public ; but the court there held by a majority opinion, that the erection of the elevated street railway along and upon that street — Front street, I think it is called — in front of Story's premises, was an interference with his rights in the street, and they held further, and the foundation of that opinion is that Story as an adjoining lot owner and property owner upon that street had an easement in the street, which was appurtenant to the land or lot, which formed "an integral part of the estate" in it, and constituted property within the meaning of the Constitution which could not be taken without compensation, and that the lot owner had the right to have the street kept open, and light and air furnished across the open way ; that the elevated railway being built fifteen feet above the street by abutments built in the edge of the pavement and put up some fifteen feet high, and then stringers placed across from abutment to abutment, and a street railway built upon the top of that, the court held that that was an obstruction both to the air and to the light, and also an obstruction to a free, open highway, and that, therefore, the elevated railway company had no right or power to build this elevated railway without first appropriating this property interest, which is recognized by the Court of Appeals, of Story in the street, and therefore they enjoined the continuance of the elevated railway until such time as the company should procure, either by contract or appro

priation, the right of the adjoining land owners. This is the position of the authorities so far as those questions are concerned. There are authorities in all of those cases that hold that the public has the right to authorize the construction of a street railway upon a highway or street, placing it upon the ground that it is but an improved method of travel upon the highway which was originally contemplated by the parties, by the public and by the adjoining lot owners or land owners, whether the property should be obtained by appropriation or by dedication.

Questions of the same character have come before the Supreme Court of the United States, and a full discussion of them will be found, by Justice BRADLEY, in his opinion in the case of *Barney v. Keokuk*, 94 U. S. 324; but the question there involved, to build a railroad in a street in the State of Iowa, is based almost entirely upon the holdings of the Supreme Court of Iowa. In that case it appears that the fee or title of the highways is vested in the public almost universally in Iowa, and it was so in that case; yet, the Supreme Court of that State hold that no permanent erections could be authorized by the city or by the public upon such highways while the uses of it for railway purposes, and especially for street railways, is recognized. There is still another class of cases upon which there is still more conflict, and that is the right of the public to devote or authorize the devotion of the public highways to steam railways. In the city of New York there are two or three decisions made by the Supreme Court of that State, which go to the extent of holding that the public may authorize the construction of a steam railway upon its streets, and that the adjoining lot owners in such cases would have no right to complain; that it is but an improved mode of travel; that it is a devotion of it to a public use similar to what it was originally intended, and therefore, the parties have no right to complain, and those decisions are based upon the ground that all appropriations by the public of private property for a highway must include the right to any improvements which may be discovered in the future

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for uses for which the public appropriated the property originally, and that especially the street railway is but such improved mode of user; and the cases which hold that a steam railroad may be authorized, place it on the same ground; but the large weight of authority in this country is that such user and appropriation for a steam railroad is a diversion from its original use and purpose, and is an additional burden upon the highway which could not be authorized; and the same rule would seem to be recognized by the Supreme Court of Massachusetts in the 136th Massachusetts Reports. With this class of decisions and thus much said in regard to the use to which the public may devote the highway and the manner and way in which they may use them, we come to the question: Is it a change of that user, or is the user which the public have the right to make of the highways changed or altered by the construction of a telegraph or telephone line upon the highway in the State of Ohio? —and as I have said, it is an important question; it is more important than a person would naturally suppose, taking into consideration the construction of a single line; it has become a question in many of the cities in this country what is to be done with the telegraph and telephone wires, whether companies should be permitted to continue them upon the surface as now constructed, or whether they should be compelled to place them underground; and further, as to what limitations ought to be placed upon the telegraph or telephone companies in regard to their rights of construction in the public highways and upon public grounds. This question ought to be well settled and understood. Daily, in this State as well as in other States, the public right of appropriating private property for highways is enforced; daily, almost, private individuals are dedicating their private property to the public for highways, and it is a matter of the utmost importance, what rights are given to the public in case of such dedication, or what rights the public acquire in the highway and in the property of the individual when they have appropriated it for a highway.

The compensation in case of appropriation, which the party is to receive for his private property, of course is to be measured by the extent and the kind of user which the public may devote his property to and the burdens which the public may place upon it; if it is one thing, he is entitled to one measure; if it is still more burdensome, he is entitled to another rule of compensation, and it is all important when that is being considered with the view of determining the amount the public are taking from him, and the burdens which they are placing or may place upon his property by virtue of that appropriation, and it is equally important where the individual is dedicating his property to the use of a highway for the public use. In the case of *Street Railway v. Cumminsville*, in the 14th Ohio St., Judge RANNEY, commencing on page 548, says: "We have already had occasion to say, that it is a grave error to suppose that a land owner, who has granted, or from whom an easement has been taken for a public highway, while it is held to its original uses, could complain that it was taken from the control of the public authorities, and placed in the possession of an incorporated company; that it was changed from a dirt road to a plank or turnpike road, or that it was supported by tolls instead of a public tax; but it is a still graver error to suppose that such an easement can, at the will of the public, be lawfully appropriated to the uses of any sort of a highway, without furnishing just cause of complaint on his part. So far is this from being true, that it is entirely clear that such a change as necessarily and wholly excludes the particular uses for which it was acquired, would work an entire extinguishment of the easement; and it is equally clear that, with the continued enjoyment of these uses, and in furtherance of the same general purposes, a *new use* might be authorized, requiring other adaptations, and imposing additional burdens upon the land, or destroying or impairing the owner's easement in the highway, which could not be legally resorted to without a further appropriation and compensation. The reasons for this have

already been adverted to. Such changes and additions are not within the scope and spirit, or fair intendment, of the original grant or appropriation. The man who grants an easement for a common road does not consent that the uses incident to such a work may be excluded, and the land burdened with the exclusive occupation of a locomotive railroad, although both are highways, and each in its own way facilitates travel and transportation. Such an easement, whether acquired by voluntary grant or appropriation, requires a certain reasonable and customary adaptation of the land to all the various uses to which such a road is applied. What this will require, and what burdens will be imposed upon the land, may be easily foreseen *by* him who grants it voluntarily, and easily estimated *for* him from whom it is taken by appropriation; and whatever it is, with the necessary incidents of maintaining it perpetually, constitutes the public right and interest—all else is private right, and securely guarded from invasion by the Constitution of the State. With this public right the public, through its representatives—the general assembly—may deal without restraint. It may regulate and modify the manner of using it by the public at large, and may, undoubtedly, devote its own interests to the maintenance of new structures, placed in the hands of other agencies, and calculated to advance and enlarge the general purposes for which the highway was originally constructed. But where these new structures, and new modes of travel, devolve additional burdens upon the land, and materially impair the incidental rights of the owner in the highway, they require more than the public has, or can grant, and the deficiency can only be supplied by appropriating the private right, upon the terms of the Constitution.”

Now, it will be seen, as I have already read, such an easement, whether acquired by voluntary grant or appropriation, requires a certain reasonable and customary adaptation of the land to all the various uses to which the road is applied. What this will require, and what burden may be imposed upon the land, may be easily foreseen by him

who grants it voluntarily, and easily estimated for him from whom it is taken, and whatever it is, constitutes the public right and interest.

In the case of *Pierce v. Drew*, cited from the 136th Mass., 75, ALLEN, Justice, in the dissenting opinion, says: "If when land is taken or granted for a highway, it is understood that such use may be made of it (to wit, using the highway for telegraph and telephone purposes), there can be no doubt that in many instances a very substantial increase of compensation would justly be granted to the owner; because in assessing damages, when land is taken for a highway, it is not merely a question what the land is worth, or what will be the extent of the injury from the deprivation of its use, but the owner is also entitled to compensation for the incidental injury to his remaining land which is to be estimated with reference to the use for which the land taken from him is to be appropriated; and such damages are to be allowed to him as will fairly compensate him in view of the purposes of the appropriation."

It will be noticed that Judge RANNEY in his opinion places stress upon this proposition, and when we are looking to ascertain what are the rights of the public, we should consider, of course, what the public have taken and paid for, and what was within the contemplation of the parties at the time of the appropriation or of the dedication, whichever it may be.

Then, what may be done and what may be taken into contemplation in the future in regard to the use of the highway? Of course it is conceded that under the statutes of this State and under the current decisions, the public have no right, either themselves, or to authorize anybody else, whether it should be an individual or corporation, to devote the highways or streets of the State to any such use as shall exclude the public from such uses as the property was appropriated for, or dedicated to; and so the statutes in this State make provision that no such user by telegraph or by telephone company shall interfere with the

public use ; but the statutes of our State are entirely silent upon the question whether such user shall or may in any manner or in any way interfere with the private rights of adjoining land owners, with the bare exception that they shall not interfere with any fruit or ornamental trees. Beyond that, in the statutes of this State, there is no limitation, and this subject may be a question which should be properly considered as to what the intent of the Legislature was in making any of these provisions in the statutes ; whether when they were authorizing the use of the highways of this State by telegraph and telephone companies, it was the intention to grant any more than the right—such right as the public might grant in the use of the highways—to such an extent as would not interfere with the public use thereof, and still at the same time recognizing that such interference of such constructions might interfere with the rights and property interests of the adjoining land owners, and for which they might receive compensation. Certain it is, it seems to me, that if the Legislature, when they were giving to telegraph and telephone companies the right to construct their lines in the highway, had supposed that the adjoining land or lot-owner was not entitled to any compensation, or that his rights were not interfered with, they would have provided other and further limitations and restrictions upon the way and manner and place of constructing the same, which would have protected such owner in the free and uninterrupted use of the highway in connection with his land ; but in the provisions of this statute there is no limitation excepting such as I have spoken of in regard to where they may put up poles or build their abutments, or place other fixtures of the company ; they may do it, so far as the statute is concerned, in front of a man's house or gateway or bars upon his premises any place. So far as the statute itself is concerned, unless the third section of that chapter makes such provision when it gives the right to such companies to make appropriations of private property, such would be the case.

Now, in contemplation of the use to which these streets

or highways may be put and the extent of that use, and whether a telegraph or telephone line is an additional burden, it may be said that a single line may amount to but little in the way of an obstruction or in the way of an additional burden upon the real estate of the fee of the land ; it would not be appreciable, and yet a thousand of them stretched along and upon the sides of the highway might be an entire obstruction and might entirely prevent the adjoining lot owner from passing to and from the street. As a simple illustration : in coming from the court house the other day in Youngstown, I saw a single pole standing there with 90 telephone wires stretched upon it. Supposing, instead of stretching their 90 wires upon that single pole, they had set along upon the side of that highway 90 sets of poles upon which to stretch a single wire? Is there any limit in the statute to so construct them ; are there any limitations in the statute upon the means which may be used by the telegraph or telephone companies to suspend their wires upon the side of the highways and other places, to erect poles and to put up abutments, and how ? The way and manner in which they shall be put up is in no way limited except that they shall not interfere with the rights of the public. The right of individuals is in no way recognized in all this statute, unless in the third section, which provides that the company may appropriate private property. Another view occurs in connection with this : the railroad company appropriates private property for the purpose of building a railway. This statute makes provisions and authorizes telephone and telegraph companies to appropriate from the railroad companies the right to erect and maintain upon the right of way of railroad companies, within the limitations therein specified and mentioned, either telephone or telegraph lines. Query. Is that a new burden placed upon the right-of-way of the railroad company not contemplated by the original appropriation ; was the appropriation made by the railroad company of the private property of individuals for railroad purposes also for the further purpose that any company in

the State of Ohio might go on and appropriate it from the railroad company in entire disregard of the individual rights of the owners of the property and fee therein, and devote it to a telephone or telegraph use and purpose? I say, that would be a very serious question indeed. There are one or two decisions — one in Kansas, holding it could not be done; that it is an additional burden upon the purposes and rights obtained by the railroad company when it appropriated it for railroad purposes, although it is conceded that the railroad company might have the right to erect telegraph or telephone wires for its own purposes, for the purpose of running and managing its trains; that they have not appropriated in that appropriation the right to give to others that right.

There is still another decision in this State, to be found in 35 Ohio St., upon the question of what is in the contemplation of the parties in the original appropriation. The case will be found on page 171. It is the case of the *Lawrence Railroad Company v. Williams*. Judge GILMORE writes the opinion of the court: “As between the public and the owner of the land upon which the common highway is established, it is settled that the public has a right to improve and use the public highway in the manner and for the purposes contemplated at the time it was established. The right to improve includes the power to grade, bridge, gravel or plank the road in such manner as to make it most convenient and safe for the use of the public for the purposes of travel and transportation in the customary manner, which is well understood to be by the locomotion of man or beast and by vehicles drawn by animals, without fixed tracks or rails to which such vehicles are confined when in motion. These constitute the easement which the public acquires by appropriating land for a right of way for a highway, and these, in legal contemplation, are what the owner is to receive compensation for when his land is appropriated for this purpose. The fee of the land remains in the owner. He is taxed upon it; and when the use or easement in the public ceases, it reverts to him free of

all incumbrance. In the exercise of the right of eminent domain, the State, through the general assembly, may delegate to a railroad corporation the power to appropriate a right of way for its road along and upon the public highway ; but the appropriation for this purpose cannot be constitutionally made without making compensation to the public for the injury thereby caused to its easement in the highway ; and also making compensation to the owner of the private property taken for the use indicated." Now, in this case, the court undertake to define the use for which the original appropriation was made for a highway ; it says : The right to improve includes the power to bridge, gravel or plank the road in such manner as to make it most convenient and safe for the use of the public, which is well understood to be by locomotion of man or beast and by vehicles drawn by animals, without fixed tracks or rails to which such vehicles are confined when in motion ; these constitute the easement which the public acquires by the appropriation of land for the right of highway, and these, in legal contemplation, constitute what the owner is to receive compensation for when his land is appropriated for this purpose. It will be seen that the Supreme Court of this State, both in the 14th Ohio St. and in the 35th, is looking to what rights the public have in the highways of the State, what is appropriated, and what the party may receive compensation for, and should receive compensation for, in making such appropriation. Was it within the contemplation of the parties or the public, at the time this highway here was appropriated or dedicated, whichever it may have been, that this street, or the sides of this street, might be burdened by telegraph or telephone wires ; was any such thing in the contemplation of the parties ? If so, the parties had the right to receive compensation—to demand it—but certainly neither the company nor the public would have the right to place it upon this private property, and they have not the right to place it in the highway unless by appropriation or dedication it has been given to them, and unless it was one of the uses which was within the contem-

plation of the parties at the time of the appropriation or dedication. I beg to inquire, when was it, in this State, that any such user was within the contemplation or taken into consideration when the public were appropriating private property for highways, or a person was dedicating his property to the public for a highway? Who ever, in such appropriations, took such a matter into consideration? The streets of the city, the sides of these streets, may be entirely filled with the lines of telegraph and telephone companies and with their poles. Is not that an additional burden upon the original appropriation? Did anybody at the time of the original laying out and appropriation have it in contemplation?—was it in the contemplation of the public or of anybody else, that it might be devoted to such purposes and objects? If it was, the parties have their compensation for it, and of course they have no right to complain; but as far as most of the streets and highways in this State are concerned, no such user was known at the time of the laying out and appropriation.

It is said this is an improved method for the transmission of intelligence; that under the old way, intelligence was transmitted by mail and by post-boy over the highways, and that this is but an improved method; that, therefore, it was within the originally contemplated user, and the public have the right to authorize such use of it; the Supreme Court of Massachusetts, in the case of *Pierce v. Drew*, 136 Mass. 75, so hold it, placing their decision upon that ground, by a majority opinion of five to two. The minority of the court dissented from that proposition and insisted that “It is going quite too far to hold that in law it must be deemed to have been within the contemplation of the parties, at the time of laying out of the highway, that it might be used for such new and additional purposes. They are in their nature essentially distinct from the ordinary use of a highway by travelers. It is not desirable to impose this new burden upon the laying out of highways.”

Upon this question, we have one other decision, made by

the Supreme Court of Illinois, in the case of *Board of Trade Tel. Co. v. Barnett*, 107 Ill., 507, which takes the same view as is taken in the dissenting opinion in the case in the 136th Massachusetts. These two cases are the only ones to which our attention has been called, or that we are able to find bearing directly upon the question. There is a case which was decided by the Supreme Court of Georgia, which is somewhat analogous; but that was an appropriation upon a railroad track, and perhaps does not in all its bearings involve the question which is before the court in this case. There are two decisions made, one by the Supreme Court of New York and one by the Superior Court of New York, in both of which cases it is held that the erection of telegraph poles and wires along and upon the side of a street or highway is an additional burden upon the fee, for which the adjoining owner is entitled to compensation, and which cannot be placed upon the land against the consent of the owner, without an appropriation under the Constitution of that State; they are courts of considerable authority, especially the Supreme Court of that State. There are two decisions made by the Court of Common Pleas in this State; one by Judge WILLIAMSON, of Cleveland, holding the same doctrine, and one by a Common Pleas judge in Cincinnati, which, as I understand, applies only to electric light companies erecting and maintaining their wires. Upon the question where lays the weight of authority we have a divided court in Massachusetts, five to two. We have a decision of the Supreme Court of Illinois, holding that it cannot be done without compensation, and we have the two decisions in the State of New York — one by the Supreme and the other by the Superior Court of that State, holding that it is an additional burden. We have read over very carefully the cases and the opinions both of the majority of the court in the case in the 136th Mass., and the opinion of the dissenting judges; and we think that the dissenting opinion in that case gives better grounds and reasons for their opinion than are given by the majority of the court. One of the principal grounds

for the dissenting opinion was fully recognized and affirmed by Judge RANNEY in the 14th Ohio St., and in the case which I have read from in the 35th Ohio St.; and after a full consideration of it, without taking up more time, we may say, that in our opinion, in Ohio, while the public may authorize the erection of telegraph or telephone poles along and upon the sides of a highway so as not to interfere with the public use, that, at the same time, that does not authorize their construction as against the rights of the adjoining lot or land owners; that such erections and constructions are an additional burden upon the fee of the land, which must be first appropriated or acquired by contract before they may be taken.

There was some question in regard to the evidence in this case. We admitted evidence tending to show the injury plaintiff had sustained by reason of the construction of these telephone wires along and upon the side of the highway. Witnesses were permitted to testify as to the difference in value between the farm without the telephone wires and structures along and upon the side of the highway, and also with them there. We have further considered that question in this case, and have come to the conclusion that for the purposes of damages in this case the evidence was not competent, and we exclude it entirely from our consideration in this case. As to what injury this plaintiff has sustained by reason of this erection, as we hold it is put there without right and shall grant an order for its removal, whatever injury is inflicted is but temporary. The proof in regard to it consists in simply digging the holes and setting up the poles; the proof shows, however, that the poles are set so near the hedge that they interfere with the mowing of the grass along and upon the sides of the highway, and would interfere with the trimming of the hedges of the plaintiff by hand or machinery. But what injury there is has already been done in the laying out, and the permanent use of it would be none; and so far as the damages in this case, and so far as each of the other cases are concerned, we fix them at one dollar and no

more. There is no element here of exemplary damages in the case; these telephone and telegraph wires were erected under a supposed right, and not with any intent to violate the rights of the plaintiff in the action.

There was one question that I intended to allude to, of which I have not spoken. It was insisted in the argument upon the part of the defense, referring to a ruling in the 18th Ohio, of the Supreme Court, that the plaintiffs in these cases have stood by and seen these telephone and telegraph wires erected, without objection, and knowing that money was being expended for that purpose, and that therefore they cannot now complain by way of injunction; that their only remedy is to proceed under the statute to compel an appropriation. But in this case the plaintiff did object; he commenced an action to prevent; he sought to enjoin, and his action was still being maintained when these poles and wires were erected and placed along and upon the highway. So it cannot be said that the defendants expended their money in the erection of these wires and poles upon the apparent acquiescence of the plaintiff in their construction, and under these circumstances no estoppel ought to be urged as against the plaintiff. The testimony of witness for the defense was to the effect that he said to the plaintiff that if he had any particular place where he desired to have the poles placed, they would be placed there. There is no proof and the witness did not undertake to testify that the plaintiff said where they should place the poles; he simply said he did not want them placed where they would injure the trees. So far as the proof is concerned, it shows he was all the time and has been objecting by this law suit down to the present time.

There is another question that we have considered, and that is: This company has erected these poles and lines along and upon the sides of this highway; it is a line running from Warren to Painesville; they have done it under a supposed right, and we find that if an order is issued now for the removal of the wires and poles along the

premises of the plaintiff it would of course break up the entire business of the company over its whole line. Under these circumstances, we think we ought not to issue such an order, but that the defendant should have reasonable opportunity to acquire this right to maintain this line along and upon the property of the plaintiff, as well as of the other plaintiffs in this action; and, therefore, time should be given for that purpose, and in this case we think we ought to give a reasonable time for the defendants to acquire this right. There may be a question, and I think fairly there is a question, whether this company, being a foreign corporation, has any rights under the laws of Ohio to appropriate property for its uses. True, in the 22nd Ohio St., it is to be found, commencing on page 412, that the Pennsylvania company had the right to appropriate private property in this State for railroad purposes or uses; but in that case the court find that the charter of that company expressly authorizes them to appropriate private property for railroad purposes, and that the Legislature of this State had by an enactment authorized such company — a railroad company, owning a line running in Pennsylvania and Ohio — with such powers to appropriate private property; so by the statutes of this State and the charter of the company in Pennsylvania, that company in this State had the right to appropriate private property. But we are unable to find in the statutes authority for any foreign telegraph or telephone company to appropriate private property in Ohio; it is, however, not necessary to pass upon this question in this case. We would put on a time for the taking effect of this order such as would give the company a reasonable time to acquire by purchase or appropriation, if they have that right, the right to maintain their lines along and upon the side of this highway. This same kind of an order was allowed in the case spoken of in 90 N. Y., in the *Elevated Railway cases*.

We think that ninety days would be ample and sufficient time, taking into consideration the interests of both parties.

Broome v. Telephone Co.

By FRAZIER, J. (additional): We have found that certain matters which were averred in the petition, such as the injury to fruit trees, the injury to shade trees, the injury to the premises and the injury to the ingress and egress — the going in and out on the premises, were in nowise interfered with; except such only as the placing of the poles in the manner described would naturally make. The evidence is that the line is not at least within forty feet of the building, sixty feet from the entrance to the barn, and thirty feet from the entrance to the house; but we do not find that it interferes with the fruit or ornamental trees; in other words, it does not interfere with anything of the character which the statute provides it shall not.

NOTE.—See note to *Mt. Adams & Eden Park Inclined Ry. Co. v. Winslow*, *post*.

JONATHAN I. BROOME v. THE NEW YORK & NEW JERSEY
TELEPHONE COMPANY.

Court of Chancery of New Jersey, Jan. 12, 1882.

(42 N. J. Eq. 141.)

TELEPHONE POLES.—ABUTTING OWNER.—INJUNCTION.

A statute provided that telephone or telegraph poles could be erected in highways only after obtaining the consent of the abutting owner, or, in case of his refusal to consent, acquiring the right by condemnation.

In defiance of the statute and of the protests of the owner, plaintiff, without consent or condemnation, the defendant company erected its poles upon his land.

Mandatory injunction granted, prohibiting both the erection of more poles and maintaining those already erected.

BILL of injunction. On bill and affidavits, and order to show cause thereon, and affidavits on the part of defendants.

H. Wallis, for complainant.

M. Egleston, of New York, for defendants.

The CHANCELLOR: The complainant seeks relief against an invasion of his proprietary right to his land. The defendants, a telephone company, without any leave or license from or consent by him, but, on the other hand, against his protest and remonstrance, and in disregard of his warning and express prohibition, and without condemnation, or any steps to that end, set up their poles upon his land. And they make no claim or pretense of any warrant or authority whatever, except permission given by the Essex public road board, not to them, but to the Bell Telephone Company of New Jersey, whose successors they claim to be. It is enough to say, on that head, that it does not appear that the road board had any power to authorize any one to set up poles in the land of the highway, and thus subject the land to an additional servitude besides that for which it was condemned. What has been said is sufficient, of itself, to establish the right of the complainant to relief; for, in order to justify the defendants in setting up the poles, it is necessary for them to show that they have acquired the right to do so, either by consent or condemnation, from the owner of the soil. The designation, by the city or town authorities, of the streets where the poles may be set up, is not enough.

The act to incorporate and regulate telegraph companies (Rev. p. 1175, 8), while it provides that the companies incorporated under that act shall, before setting up the poles in the streets of any incorporated city or town, get from such city or town a designation of the streets in which the poles shall be placed, and the manner of placing them, etc., expressly provides, also, that the consent in writing of the land owner must first be obtained before the poles shall be set. The supplement to the act (P. L. of 1880, p. 201) provides that, upon application of any telegraph or telephone company organized under the original act, to the

common council or other legislative body of an incorporated city or town through which it is intended to construct the lines, the designation shall be made ; and it provides, also, for a condemnation, in case the owner of the soil refuses his consent to the setting of the poles in his land.

It is wholly unnecessary in this case to pass upon the question raised upon the argument whether the township of East Orange, which has special municipal powers, is an incorporated town within the meaning of the above-mentioned eighth section of the original act. When the bill was filed, the defendants were proceeding with the erection of the poles, and, before the order to show cause (which contained an *ad interim* stay) could be served, they had, it appears, finished setting them. They now urge that, if an injunction be awarded, it should not be such as to require them to remove the poles, but should at most merely prohibit them from putting the cross-arms and wires thereon. But, as before stated, their action in setting the poles was in complete defiance of the complainant's rights. There has been no delay in his application to this court for relief. The fact that the setting of the poles is finished is due to the activity of the defendants in completing the work, all of which was done after his earnest assertion of his rights. Where a defendant thus invades the proprietary rights of a complainant, he has no ground for asking that the court will give him the benefit of his activity and persistence in wrong doing. The defendants have had an opportunity of making defense under the order to show cause. They have not seen fit to answer, but have put in affidavits. They have shown neither warrant nor excuse for the act of which the complainant complains. Under such circumstances, the court will not hesitate, in a proper case, to grant a mandatory injunction. *Whitecar v. Michenor*, 37 Stew. Eq. 6. This is such a case. Where there is a deliberate, unlawful and inexcusable invasion by one man, of another's land, for the purpose of continuing trespass for the trespasser's gain or profit, and there has been neither acquiescence nor delay in applying to this court for relief, the

mere fact that the trespass was complete when the bill was filed will not prevent an injunction in the nature of a mandatory injunction against the continuance of the trespass. Joyce, Prin. Inj. 64.

In *Goodson v. Richardson*, L. R. 9 Ch. App. 221, where water pipes had, without the consent of the owner of the soil, been laid in the soil of a highway, an injunction to restrain the continuance of the nuisance was granted. If the delay necessary to make application for relief gives the trespasser an opportunity to complete his trespass, that should not deprive the injured party of his claim to relief. It cannot convert the lawless misdeed of the wrong-doer into an equity in his favor.

There will be an injunction prohibiting the defendants from setting poles upon the lands in question, and from allowing those which they have placed there to remain.

NOTE.—This case is cited in *Winter v. N. Y. & N. J. Teleph. Co.*, *post*.
See note to next case.

THE MT. ADAMS & EDEN PARK INCLINED RAILWAY CO.
v. HOWARD WINSLOW ET AL.

First Circuit, Hamilton Co., Ohio, Circuit Court, Nov., 1888.

(8 Ohio Circ. Ct. R. 425.)

ELECTRIC RAILROAD.—POLES IN STREETS.—RIGHTS OF ABUTTING OWNERS.

The erection of poles in streets for purposes of an electric railway does not impose a new burden so as to require compensation to or consent of abutting owners, to whom no special injury results.

The case is not exactly analogous to that arising where the poles are to support wires for the transmission of messages by electricity.

Case of this series cited in opinion: *Smith v. Cent. Dist. Teleph. Co.*, *ante*, p. 237.

ERROR to the Court of Common Pleas of Hamilton county. Action for injunction to restrain erection of poles

for a trolley system of street cars. Further facts appear in opinion.

Ramsey, Maxwell & Ramsey and *E. W. Kittredge*, for plaintiff.

Harmon, Colston, Goldsmith & Hoadley, for defendants.

SMITH, C. J.: We find, from the evidence in this case, that the council of the city of Cincinnati has duly authorized the plaintiff to construct and operate an electric system of motive power on all the lines of street railroads owned and operated by it, the work of construction to be done under the supervision of the board of public affairs of such city. Under the authority thus granted, and under the supervision of said board, and of the city engineer, the plaintiff, owning and operating the line of street railroad in question, running on Gilbert avenue, in front of the premises of the defendants, and thence to and over McMillan and other streets of the city to the Reading road, has constructed an electric system of motive power, practicable in character; and, as an essential part of said system, has placed a pole eleven inches in diameter at the bottom, and twenty-seven feet in height, in front of defendants' said premises on Gilbert avenue. It is placed opposite to a partition wall of a three-story building of the defendants, on said premises, used for shops and lodgings, and close to the curbstone. By the plan now adopted, similar poles, about one hundred feet apart, are placed on each side of the streets along which said line of street railroad runs, and said poles are opposite to each other. A single wire is stretched on each side of the street from the top of one pole to the top of another on the same side, and from the top of each of said poles a wire extends to the top of the pole on the opposite side of the street, with a guard wire above it. The object and purpose of the first named of these two wires across the street is, to support the two other wires, one of which runs parallel with and immediately above

each of the two tracks on which the street cars of the plaintiff, propelled by horse power, have been running for several years past. The wires on each side of the street are intended to convey a current of electricity to assist in the propelling of the cars on the tracks, as is also the wire extending across the street. And the court further finds that there is no danger to life or property from the use of said wires and the passage of the electric current over the same, and that the placing, continuance and use of said pole and wires, in the manner aforesaid, do not and will not work any substantial injury to the premises of said defendants, or materially impair their rights therein, or operate as a substantial impediment to their access to said premises.

On this finding of facts, what are the legal rights of the parties? We think it may be regarded as the well established law of the State, that a street railroad may be lawfully constructed, maintained and operated, over and along the streets of a municipal corporation, where the right to do so has been granted by the corporate authorities, without obtaining the consent of a property holder (except that consent of a majority of the property holders on each street so occupied, as required by sec. 2502 Revised Statutes), along the line of such street, unless some *special or particular* injury is thereby done to him. If such injury *does* result, the consent of such person must be obtained to what is, in effect, an appropriation of his interest in the land to the use of others, or his right therein must be acquired in some way known to the law.

The right to the use of the highway for the purposes of a street railroad, when no such special injury results to an adjacent land holder, as we understand from the very able and instructive opinion of Judge RANNEY in the case of *The Cin. & Spring Grove Avenue Street Railway Co. v. The Village of Cumminsville*, 14 Ohio St. 523, is based on this doctrine, that "the use of such highway for the purpose of carrying passengers over the same, in this particular manner, differs in nothing from the exercise of the common

right of carrying them by coaches or omnibuses ; and everything needing a grant, or the further authority of law, is the right to place and maintain in the highway the necessary conveniences for this new description of carriages. When this grant is confined to a mere occupation of the easement, previously acquired by the public, although its enjoyment may require a restriction upon former modes, we can see nothing in it but the control, regulation and adjustment of a public right, so as to make it best answer the purposes, and meet the wants of all classes of the community. It does not exclude or seriously interfere with the original modes in which the highway was used ; but simply adds another, in furtherance of the same general object.” And, as stated in another part of the same opinion, “in either of the modes known to our laws, by which lands are acquired for a public highway, an interest commensurate with the attainment of the objects of the acquisition rests in the public at large, and is necessarily placed under the exclusive control of the law-making power. Whatever is fairly within the contemplation of a grant, whether voluntary or enforced, and necessary to its beneficial enjoyment, is within the legal operation of the instrument or proceeding by which it is effected.” * * * “But when new structures and new modes of travel devolve additional burdens on the land and *materially* impair the incidental rights of the owner in the highway, they require more than the public has or can grant, and the deficiency can only be supplied by appropriating the private right upon the terms of the Constitution.” In this case, the tracks of the street railroad continue in the condition in which they have been for several years past — the only addition or change which has been made to adapt it to the use of the electric motor being the poles and wires before referred to. If the structure of the plaintiff in the street, so long in use, is not an invasion of the rights of the defendants (though the same must in the nature of things be *some* obstruction to the highway, but largely compensated in a populous city by the advantages of this mode of

travel), it is difficult to see why the mere placing of a pole of this size, on the margin of the sidewalk, at once, and necessarily, gives to the owner of the adjacent premises, the right to prevent it or to have it removed. The sidewalk is only a part of the highway, and is to be dealt with as such, and it seems to us that a structure erected thereon stands on the same principle as those in the center of the street.

And why should the planting of the pole in this instance be held, on the evidence, to entail any special damages to the defendants? It is not objected to that it is unsightly in appearance, or unsuited to the purpose for which it is used; all that is claimed is, that it impedes the access to defendants' premises, and that the electrical system in use is unsafe. We have found as a fact that neither of these objections is well founded. The margin of the sidewalk in cities and villages, for centuries past, has been appropriated for the placing of shade trees, public lamp posts, awnings, hitching posts and similar structures, and when they are suitably placed, and at sufficient intervals, cannot, we think, be any material obstruction to the access to the premises adjacent thereto, or to be said to impose new burdens upon the land, the right to impose which had not been acquired by the public.

It is urged upon us by the counsel for the defendants, that the question before us is exactly analogous to the placing of posts for the carrying of wires for telegraph or telephone service, and that while it may be true that the weight of authority in other States may be in favor of the doctrine that such use of the highway does not impose a burden on the adjacent premises, for which compensation must be made, yet that the decisions on the subject are conflicting, and those so holding are by divided courts, and that in Ohio the question has been settled as to the use of the highway for such purposes, so far as a decision of the Circuit Court can do so, by the case of *Smith v. The Telegraph Co.*, 2 Circuit Court Rep. 259.

Whether a structure erected in the public highway for

the support of the wires for the transmission of messages by electricity stands on precisely the same footing as one for the purpose of travel over the highway (the original and principal object for which the public acquired the right) may be a question of doubt. The former certainly could not have been in the contemplation of the parties to the original grant, when the right to this highway was acquired, which was over fifty years ago. Nor could it have been contemplated that it would be used either for a horse railroad, or for the running of cars propelled by electricity, over the same, for neither of these modern improvements was then thought of. But it *was* acquired that the public might *travel* over the same on foot, on horse-back or in vehicles of various kinds, and, as we have before stated, we think it is the law of this State that the use of cars drawn by horses on rails permanently placed in the roadway is not to be considered *per se*, of *itself*, an unlawful or improper change of the use of the highway, or as imposing an additional burden upon the adjacent land. And if this be so, then the use of it, in substantially the same way, but with a different motive power, would not alter the case. It is still a mode of travel over the same highway. While, therefore, we entertain a high opinion of the ability and learning of the court making the decision referred to, we do not understand that it involves precisely the same question which is presented to us, and we feel bound to adopt what we think is the principle announced by the Supreme Court in the case to which we have so fully referred, and which certainly must be allowed to be the leading case in Ohio on the questions there discussed.

One other argument was presented by the counsel for the defendant, which is extremely plausible, but which we think is unsound, and it is one which is referred to in the decision of the Circuit Court which we have cited. It is this: that although it may now be said that this one pole and the wires strung upon it, may not now be injurious to the defendants' property, what is to prevent the plaintiff, when it desires to do so, from placing *other* poles

in front of these premises, and a much greater number of wires on them? Or if the plaintiff cannot be prevented from doing this, why may not the various telephone or telegraph companies who may obtain a grant from the council to do so, also plant *their* poles in front of defendants' premises, and string a vast number of wires upon them, thus practically shutting the defendants in and occupying the entire sidewalk?

It seems to us that the answer to this argument, which was made by the counsel for the plaintiff, was a conclusive one. This is a practical question as to the use of the streets as it is now being done by the plaintiff. Is it of that exclusive character which operates to deprive the defendants of their rights, by causing them substantial injury? If not, then the fact, that if other structures may be erected near to this property hereafter, great injury would result to the defendants, is not to be taken into consideration in this case, for it must be supposed that when any substantial right of theirs is invaded, the courts will interfere to prevent it. When such a case is presented, it will be time enough for such action.

Holding these views, we think there should be a decree for the plaintiff.

NOTE.—The rights of abutting owners with reference to the erection and maintenance of poles and wires in highways is a subject of much importance, especially of late, when the streets of cities and villages are congested and even country highways thickly studded with these appliances required by the many uses to which the electrical agent is now being applied,—and the courts have given much attention to it. No more useful note can be placed here than one referring to Mr. Keasby's very useful monograph on Electric Wires, five chapters of which, being considerably more than one third of the whole volume, are devoted to the particular subject here under consideration. His book was published in 1892, and the greater number of his cases were decided subsequent to the time covered by this volume. Such will appear later in this series, together with other and later cases.

It is not purposed here to make any analysis or comparison of the reported cases. Attention may, however, be called to the fact that while the right of the abutting owners as to uses of highways is sometimes made to turn upon his ownership of the fee of the street, the prevailing opinion of

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the courts now seems to be that the question of ownership is unimportant; that, as Mr. Keasby concisely put it, "the abutting owner, whether he owns fee the or not, has a substantial right in the street, a right to have it kept for use as a street for access to his property and to afford light and air, and that this is a right of property which cannot be taken from him without compensation."

This question has been very fully discussed in a series of cases arising over the elevated railroad structures in the city of New York, where the fee of the streets is concededly in the city, and still the abutting owner was held entitled to compensation for injuries done him.

The Court of Appeals of New York has in a very recent case, *Eels v. The American Teleph. & Tel. Co.*, 143 N. Y. 133 (Oct., 1894), affirmed the right of the owner of land adjoining a country highway, to the center of which he owned the soil, to maintain ejectment against a telegraph and telephone company which had erected its line upon the highway without his consent and without condemnation.

In addition to the foregoing five cases upon the general subject of the rights of abutting owners as to the placing in highways of poles and wires for electrical purposes, see INDEX to vol. 1, subjects "Poles and Wires in Streets: Rights of Abutting Owners," and "Eminent Domain."

NEW YORK AND NEW JERSEY TELEPHONE COMPANY v.
THE STATE, JONATHAN J. BROOME, Prosecutor.

Court of Errors and Appeals of New Jersey, May 23, 1888.

(50 N. J. L. 432.)

TELEPHONE COMPANIES.— EMINENT DOMAIN.

In a statutory proceeding to assess the damages to an owner of the soil of a street by the erection of a telephone line, if the petition and notice do not indicate the location and height of the proposed poles, the number and size of cross-bars or number of wires, the petition is fatally defective.

APPEAL by the defendant below from judgment of the Supreme Court. For facts further than here stated, see *ante*, p. 259.

Theodore Runyon, for plaintiff in error.

Hamilton Wallis, for defendant in error

The opinion of the court was delivered by

THE CHANCELLOR: The Supreme Court, by its judgment, set aside proceedings for the appointment of commissioners to appraise the damages to be sustained by Jonathan J. Broome by reason of the erection and maintenance of telegraph poles, wires and other fixtures, in front of his lands, along Park avenue, in the township of East Orange, upon two grounds :

First. Because the petition for the appointment of the commissioners is too indefinite to appaise the commissioners of the burden which they are to estimate, and the land-owner of the burden to which he is to submit.

Second. Because the act to incorporate and regulate telegraph companies (Rev. p. 1174) and its supplement (Rev. Sup., p. 1022) required the plaintiff in error to apply to the legislative body of the township of East Orange for a designation of the streets in which its telegraph poles might be placed, before it could proceed to have the damages to accrue to individuals assessed. The petition states that the telegraph lines to be constructed will run over and across a public road (designated upon a schedule diagram annexed to the petition) which adjoins and is in front of the lands of Mr. Broome, "and that the said highway is required and necessary to be used and taken for the purpose of erecting posts or poles on the same for the purpose of sustaining wires and other fixtures of the petitioner."

The schedule annexed to the petition is a diagram upon which Park avenue and Mr. Broome's land are delineated. In Park avenue, adjoining the premises of Mr. Broome, there appear upon this diagram five dots, to indicate telegraph poles; but neither the petition nor the schedule mentions a scale by which the exact or even proximate location of the poles may be determined, or contains a description by which their size or other character may be ascertained. Nothing either in the petition or schedule, or in the notice that was given to Mr. Broome, indicates the intended heights of the poles, the number and size of the cross-arms they will bear, or the number of wires they

will sustain. These particulars are necessary, in a case of this kind, to the ascertainment of the privilege or right of way which is to be secured. The statute under which the proceedings have been taken (Rev. Sup., p. 1022, § 2) requires the commissioners to assess and appraise the damages which Mr. Broome may sustain by reason of the erection and establishing of, not poles alone, but completed telegraph *lines*. The petition and proceedings obviously fail to sufficiently indicate the privilege desired, and therein to point out the extent of the injury contemplated, and give such information as is material to the commissioners in the proper performance of the duty imposed upon them, and to Mr. Broome in the due protection of his interests.

The Supreme Court was correct in its opinion that the petition was too indefinite to be sustained.

Our conclusion upon this point obviates the necessity of expressing an opinion upon the other branch of the case, upon which the Supreme Court passed; and the act of 1887 (Pamph. L. p. 119), has so changed the law that it is not a public utility that we should do so.

The judgment of the court below will be affirmed.

For affirmance—The CHANCELLOR, CHIEF JUSTICE, DEPUE, GARRISON, MAGIE, SCUDDER, CLEMENT, COLE, MCGREGOR, WHITAKER, 10.

For reversal—None.

NOTE.—See INDEX to this and the prior volume, title “Eminent Domain.”

**HERMAN WINTER V. THE NEW YORK AND NEW JERSEY
TELEPHONE COMPANY.***Supreme Court of New Jersey, Nov. 20, 1888.*

(51 N. J. L. 83.)

TELEPHONE COMPANY.—CONDEMNATION OF LAND FOR POLES.

Condemnation proceedings held invalid for failure to comply with statutory requirements.

Defects held not waived by consent of the land owner.

Cases of this series cited in opinion: *N. Y. & N. J. Teleph. Co. v. East Orange, ante*, p. 138; *Broome v. N. Y. & N. J. Teleph. Co., ante*, p. 259; *State, Trenton & N. B. Turnpike Co. et al. Pros. v. Am. & Eur. Com. News Co.*, vol. 1, p. 843.

Certiorari to set aside the report of the commissioners appointed to appraise damages.

R. V. Lindabury, for plaintiff.

Frank Bergen, for defendant.

The opinion of the court was delivered by VAN SYCKEL, J.: The contest in this case is as to the validity of the proceedings taken by the defendant company to assess and appraise the damages which the relator sustains by reason of the erection and establishment of telephone poles upon and along his property on Liberty street, in the city of Plainfield, in this State.

The proceedings were taken by virtue of the act concerning telegraph companies (Rev. p. 1174), and the supplement to said act (Sup. Rev. p. 1022).

The first section of said supplement provides that whenever any telephone company, organized by virtue of the act to which it is a supplement, or by virtue of any special act, shall apply to the common council of any incorporated city or town, through which it is intended to construct their line, for a designation of the streets in which the posts or poles of such company may be erected, it shall be the duty

of such common council to give to such company a writing designating the streets in which the posts or poles shall be placed, and the manner of placing them.

The petition in this case fails to show that the said company was organized under any law of this State so as to be within the operation of said supplement; nor does it appear that the common council designated, in writing or otherwise, the streets in which poles were to be placed.

These matters were essential to give the Circuit Court power to act in pursuance of the statute. *New York and New Jersey Telephone Co. v. East Orange*, 15 Stew. Eq. 490; *Broome v. Telephone Co.*, 20 Vroom. 624; S. C., 21 Id. 432.

There is also a failure to give a proper description of the poles, and the premises to be occupied by them, so that the burden to be imposed upon the relator, and the right to be acquired by the company, will be defined and settled. Our adjudications hold this to be a fatal omission. *Turnpike v. News Co.*, 14 Vroom. 381; *Broome v. Telephone Co.*, *supra*.

In this case it appears affirmatively that the defendant company never applied to the city council for permission to erect poles. The New Jersey Telephone & Telegraph Company obtained such permission, but the grant of that company was expressly made non-assignable, and therefore the defendant could not lawfully succeed to that license.

These substantial defects were not cured by the neglect of the prosecutor to point them out when the commissioners were appointed, nor by his consent to such appointment.

The defendant company has not brought itself within the provisions of these legislative acts so as to establish any rights under them. The relator could waive notice and objections to commissioners, and he could agree upon the amount of damages to be assessed to him, but he could not by his consent give power to the court in a case not within the statute. His verbal consent to the taking of his land, if given, would be revocable.

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The proceedings below should be set aside, but without costs, because the objections now relied upon were not taken before the Circuit Court.

NOTE.—See INDEX to this and prior volume, title “Eminent Domain.”

THE CHICAGO AND ATCHISON BRIDGE COMPANY v. THE
PACIFIC MUTUAL TELEGRAPH COMPANY ET AL.

Kansas Supreme Court, Jan. 7, 1887.

(36 Kan. 113.)

POST-ROADS ACT.—EMINENT DOMAIN.—INJUNCTION.

(Head note by the court):

A telegraph company, in the exercise of eminent domain, instituted a proceeding to condemn and appropriate so much of a bridge as was necessary to support a line of magnetic telegraph proposed to be built, and for the construction, maintenance and operation of the same. The bridge was built in pursuance of State and national legislation, and spans the Missouri river at Atchison, Kansas, where the river is navigable, and where it divides the States of Kansas and Missouri. The company owning the bridge, claiming that the condemnation proceeding was without authority of law, brought an action to enjoin the same, and to prevent any interference with the bridge. *Held*, that, before the telegraph company can construct its line at the point named, it must file with the postmaster-general a written acceptance of the restrictions and obligations imposed by Congress in ‘An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes,’ approved July 24, 1866, and that the failure to file such acceptance is fatal to the condemnation proceeding.

Case of this series cited in opinion: *Telegraph Co. v. Texas*, vol. 1, p. 373.

APPEAL from Atchison District Court. Proceeding to reverse ruling of District Court, dissolving a temporary injunction. Facts stated in opinion.

Everest & Waggener, for plaintiff in error.

Jackson & Royse, for defendants in error.

The opinion of the court was delivered by JOHNSTON, J.:

This proceeding is brought by the Chicago & Atchison Bridge Company to reverse the ruling of the District Court of Atchison county dissolving a temporary injunction which had been allowed against The Pacific Mutual Telegraph Company, and also Churchill J. White. E. G. Armsby, and Ed. W. Howe, who had been appointed commisssioners in a condemnation proceeding. On the twenty-first day of May, 1886, The Pacific Mutual Telegraph Company presented a petition to the judge of the District Court of Atchison county, asking the appointment of three commissioners to appraise the value of the property proposed to be taken, and to assess the damage that the bridge company might sustain by the appropriation of "so much of the railroad and highway bridge which spans the Missouri at the city of Atchison, and which extends from the west bank of said river, in the State of Kansas, to the east bank thereof, in the State of Missouri, as may, from time to time, be deemed necessary for the construction, maintenance, and operation of a line of magnetic telegraph, and to erect poles, piers, abutments, arms, brackets, wires and such other necessary fixtures for a magnetic telegraph as may, from time to time, be deemed necessary; and after the same is erected, and when necessary, to go upon said property to repair the said line of magnetic telegraph."

The petition gave the details of the plan and materials to be used in the construction of the line, and the manner by which the wires should be attached to and supported upon the bridge. The application of the telegraph company was granted, the commissioners were appointed, who gave notice that, at a stated time, they would, in accordance with the prayer of the petition, proceed to make appraisal of the property to be taken, and to assess the damages of the bridge company, by reason of the construction of the line on the structure of the bridge company, when the present action was begun, and the temporary

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injunction allowed. On the motion of the defendants, the temporary injunction was vacated and discharged, and this ruling is the subject of the complaint.

The bridge to which the telegraph company proposes to attach its wires is owned by The Chicago & Atchison Bridge Company, a consolidated company existing under the laws of Kansas and Missouri. It was built across the Missouri river at the city of Atchison, where the river is navigable, and where it divides the States of Kansas and Missouri. It appears that, under an act of Congress, authorizing the construction of the Pacific Railroad system, there was granted to certain railroads the right and franchise to construct a bridge over the Missouri river at Atchison, Kansas, and the manner of its construction was therein provided (13 U. S. Stat. at Large, c. 216, § 9). Afterwards the privileges, rights and franchises granted by that act to the railroad companies for the building of the bridge were transferred to the bridge company, upon the condition that the bridge should be constructed in the manner provided by Congress, and the bridge company accepted the transfer, assumed the obligations of the railroad companies, and thereafter constructed and completed the bridge in accordance with the terms and conditions of the act of Congress, and of the assignment. The act of Congress required the bridge to be built with suitable and proper draws for the passage of steamboats, and in such a manner as not to impair the usefulness of the river for navigation to any greater extent than such structures of the most approved character necessarily do. The bridge was built with a draw-span, and the telegraph company claimed that the manner in which it proposed to construct and attach its line to the bridge would not interfere with the turning of the draw-span, nor with the performance of the duties owing by the bridge company to the general government. The bridge company denies the validity of the condemnation proceeding, and insists that, for several reasons, the injunction should have stood, and been made perpetual.

It is claimed that the bridge is already devoted to a

public purpose, and can not be taken for another and different purpose than that contemplated by the charter and the act of Congress under which it was built. It is urged that, if the bridge is burdened with the lines of the telegraph company, the use and purpose for which the bridge was built will be impaired and destroyed, and the plaintiff will be obstructed in discharging the obligation which it owes to the Federal government. It is also said that no necessity exists for the building of its line upon this bridge; and, among other objections and complications, the plaintiff suggests that if the defendant acquires the right in the bridge which it seeks, and it should become necessary to remodel the entire structure, the defendant might interfere, and prevent it from being done. Counsel for the bridge company say that such condemnation would, in any event, make a joint proprietorship between the bridge company and the telegraph company, with paramount right in neither. In case of necessary repairs to the bridge, how shall the necessary expense of such repairs be paid? Who shall determine the necessity of such repairs? If the telegraph company gets the right to appropriate so much of said bridge, from time to time, as it may deem necessary, this is a perpetual right, and in fact, if not in law, constitutes ownership—at least, proprietorship. In that event, which company shall pay the taxes? If both, in what proportion? Who shall insure the bridge? If the telegraph company has an insurable interest, what is its proportion?

We need not decide in this case whether this and other telegraph and telephone companies can place their wires and fixtures upon a structure which may not have been built with reference to supporting such burdens, and which is already devoted to a specific public use. We also pass over the question of necessity, and shall not undertake to determine whether the characteristics of the country in and about Atchison require the use of the plaintiff's bridge in order to afford the telegraph company an entrance to the State and city; or whether the telegraph company can, by

the building of posts or piers in the river or upon the banks, or upon some of the islands of the river, gain an entrance into the State without interference with property in public use. These and other questions that have been presented are purposely passed over, for the reason that a preliminary and essential step which, in any event, is necessary to the validity of the condemnation proceeding, has been omitted. It is admitted that the Missouri river is a navigable one; and, under the commercial clause of the Federal Constitution, the power of Congress over such rivers, and in regard to the bridging of the same, is supreme. It will also be conceded that the telegraph is an instrumentality of commerce; and, under the same constitutional provision, it, like other commercial agencies engaged in interstate traffic, comes within the protection and regulating power of Congress. *Telegraph Co. v. Texas*, 105 U. S. 460. Upon the subject of telegraphs, Congress has taken affirmative action, and has given authority and provided how and upon what conditions telegraph lines may be constructed over and across the navigable streams and waters of the United States. 14 U. S. Stat. at Large, c. 120. Section 4 of that act provides that,

“Before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the postmaster-general of the restrictions and obligations required by this act.”

The defendant is seeking to avail itself of the privileges of this act by constructing a telegraph line from the State of Missouri into the State of Kansas, over a navigable stream, without complying with its requirements. The obligations and restrictions to be accepted are important in their character, one of which is that the telegraph line should be so constructed and operated as not to obstruct the navigable streams and waters, or interfere with the travel on the military and post-roads. Congress has intervened, and has seen fit to make the filing of a written acceptance an essential prerequisite to the building of a

telegraph line over a navigable stream, and to the enjoyment of the privileges conferred by that act, and its authority is paramount. The petition of the telegraph company in the condemnation proceeding does not show that the written acceptance was filed, and in argument counsel for the telegraph company practically concede that it was not done; and hence we must hold that the proceedings were invalid, and that the injunction should have been continued.

The ruling of the court in vacating the temporary injunction theretofore allowed will be reversed, and the cause remanded for such further proceedings as may properly be taken.

All the justices concurring.

NOTE.—See INDEX to this and to prior volume, titles “Eminent Domain;” “Post-roads Act.”

**THE PACIFIC MUTUAL TELEGRAPH COMPANY ET AL. V.
THE CHICAGO AND ATCHISON BRIDGE COMPANY.**

Kansas Supreme Court, Jan. 7, 1887.

(36 Kan. 118.)

**TELEGRAPH COMPANY.—CONDEMNATION.—OBSTRUCTION OF NAVIGABLE
STREAM.—INJUNCTION.**

(Head note by the court):

Where a telegraph company presents an application to the judge of the District Court and secures the appointment of commissioners to condemn a right of way for a telegraph line over and along a bridge which spans a navigable river, and therein specifically states the property proposed to be taken, and the particular manner by which it is proposed to attach the wires and other fixtures to the bridge, and it is found that the method outlined in the application will interfere with the opening of the draw span of the bridge, and obstruct the navigation of the river, the owner of the bridge is entitled to an injunction to restrain the company and the commissioners that were appointed from proceeding further under the application, and a proposal by the telegraph company, in its

answer in the injunction proceeding, to so change its plan as to obviate the objections, and which is a substantial departure from the plan stated in the application, will not defeat the action for injunction.

ERROR from Atchison District Court. Appeal from judgment granting injunction. Facts stated in opinion.

Jackson & Royse, for plaintiff in error.

Everest & Waggener, for defendant in error.

The opinion of the court was delivered by JOHNSTON, J.:
The Pacific Mutual Telegraph Company presented an application to the judge of the District Court of Atchison county for the appointment of commissioners to condemn the right to construct and maintain a telegraph line along and over the north side of the bridge of the Chicago & Atchison Bridge Company, which spans the Missouri river at Atchison, Kansas, and to appraise the value and assess the damages to the bridge property taken for such purpose. On this application commissioners were appointed. Afterward the bridge company began an action, and obtained a temporary injunction enjoining the telegraph company and the commissioners from proceeding with the condemnation. Issues were joined, and trial had before the court, which resulted in a decree enjoining the telegraph company from proceeding farther under the condemnation proceeding that had been instituted, to reverse which this proceeding is brought. The District Court found and placed its decision upon the fact that the plans of the telegraph company, for the construction and operation of its line across the bridge, as stated in its petition to the judge of the District Court, and upon which the commissioners were appointed, was impracticable, and would interfere with the opening of the draw-span of the bridge, and with the navigation of the river. This fact cannot well be questioned by the plaintiffs in error, as the testimony upon which it was found had not been brought here; and that the company cannot in anyway interfere with the turning of the draw-

span, or obstruct the navigation of the river, is conceded. In its answer filed in the injunction proceeding, the telegraph company outlined and proposed another plan for the construction of its line, which it claimed would not interfere with the operation of the draw-span or with the navigation of the river ; but this plan was a substantial departure from the one upon which the commissioners were appointed to condemn the right of way across the bridge.

It is now contended that it was unnecessary to state in the petition what property was intended to be appropriated, or how the wires of the telegraph company were to be attached to the bridge, and therefore the company was at liberty to disregard the plans stated in the petition, and to have the commissioners that were appointed proceed upon another and a different one. The petition or application is the initiatory step or basis of the condemnation proceeding. It is required to be in writing, and from it the judge determines whether a case is presented for the exercise of the right of eminent domain. In this case the condemning party stated particularly what use it proposed to make of the bridge, and detailed the manner in which it proposed to attach its wires and other fixtures to the same. The commissioners were appointed to appraise the damages which the bridge company would suffer if the property was so taken. They gave notice that they would proceed under the plan named in the petition, and from that notice the bridge company received information of how it and its property were to be affected.

It may be, as the telegraph company contends, that only a general allegation of its purpose was necessary in the petition, and that a detailed statement of the manner of construction was not required under the statute ; but that is not this case. There is no complaint that the petition was too general or too meager in its statement, but rather that it contained too much. The company has chosen to specifically state its purpose and plans, and has thereby made out its own case. That which is proposed and threatened to do is confessedly impracticable and unauthorized

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by law, and afforded the bridge company sufficient grounds to maintain injunction.

It is said that the new plan is practicable and proper, but it was not suggested until the action to enjoin had been begun and only then in the answer filed in the injunction proceeding; and the extent of the decree in the present case is to restrain the telegraph company from carrying out the first plan, or, in other words, from proceeding farther under the petition, order and notice, which proposed to do that which the law does not permit to be done. The decree rendered does not prevent the company from presenting another application, and instituting another condemnation proceeding, providing that which is asked for is within the law. It appears from the records of this court that the telegraph company has abandoned the first application, and is now prosecuting another one, wherein it attempts to obviate the objections raised in the first.

We think there was no error in the ruling of the District Court, and its judgment must be affirmed.

All the justices concurring.

NOTE.—See INDEX to this and to prior volume, title “Eminent Domain.”

MEMPHIS BELL TELEPHONE COMPANY v. MRS. L. E. HUNT

Supreme Court of Tennessee, April, 1886.

(16 Lea, 456.)

TRESPASS.—OVERHANGING BRANCHES.

A telephone company has no right, under a license from village authorities permitting it to erect its line in a street and cut away limbs of trees that might be in the way, to enter the yard of a private house, and cut off limbs of a tree standing there, to which the consent of the owner had been refused.

APPEAL from judgment for plaintiff in action for trespass. Defendant below is plaintiff here.

Poston & Poston, for telephone company.

M. R. Patterson, for Mrs. Hunt.

FREEMAN, J., delivered the opinion of the court.

This suit is brought to recover damages from the telephone company for entering upon the premises of the plaintiff at twelve or one o'clock at night, and cutting certain limbs on trees growing in her yard in the city of Memphis, or Taxing District.

The plaintiff had refused positively to give the employees and agents of the company permission to cut the limbs specified, and so the entry and cutting was done in the unusual manner specified. The defendant had obtained from President Hadden of the Taxing District, in pursuance of authority granted by the board of police and fire commissioners of the district, the right of way over Lauderdale street for the telephone line, the location of the line to be fixed by the city engineer. Defendant was also granted authority, says President Hadden, to cut away limbs overhanging the streets and sidewalks, that might interfere with the construction and operation of their lines, but he adds, defendant was to pay any damages that had to be paid. He stated further, that these permits meant only right of way, and in no case should interfere with the security of private property; that he did not assume to settle controversies of that kind, and the permit gave no control over private property.

The line of telephone poles was located under the direction of the city engineer immediately at the curbing on the west line of Lauderdale street, and the foreman of the telephone company says the engineer told him he might cut away any overhanging limbs that interfered with the construction of the line. In fact, a line had been previously constructed, but the poles were deemed too low by the com-

pany, and a new set of poles were being placed in the same places as the old, but taller.

The company must stand on the privilege it has obtained from the city authorities, as shown by their own witness, President Hadden, so far as their right to occupy the street and build the line thus authorized. There is nothing in this record from which we can see these parties had any rights beyond what is stated above; no claim of authority to enter upon private property by virtue of charter privileges, or in the exercise of any right of eminent domain.

The court, among other things, charged the jury, that if defendant, by its agents, entered upon the inclosure of plaintiff, against her will, for the purpose of cutting the trees or limbs, it was trespass; and this was so even if it was done for the purpose of clearing a space for their wires outside the enclosure, in case they had the right to clear such space.

The jury found a verdict for plaintiff for \$250. The referees recommend a reversal on two grounds, we believe: First, the improper admission of testimony of President Hadden, to the effect that three of the defendant's employees had been brought before him, as presiding judge of the police court, and fined \$3 for the misdemeanor, in cutting the trees of plaintiff. The record says this question was objected to by defendant in general terms, as incompetent and irrelevant, but permitted to go to the jury. Second, because the charge of the court in reference to the implied license by the corporate authorities, to permit the limbs of the trees to grow over the street, to be inferred from the fact that this had been permitted for many years, was unnecessary, erroneous and irrelevant. We see no reversible error in this last proposition of the referee. It is at most an abstraction, so far as the facts of the case, as found in this record, go.

The only issue was, whether the defendant showed any legal authority for the entry on the premises of the plaintiff. The right claimed was under the permission of Presi

dent Hadden, and no how else, so far as appears in the proof. It is certain, even if he had authority to grant the right to enter on plaintiff's premises, he had not done so. He had granted only the right to locate the line along the streets, the location to be fixed by the city engineer, and the defendant was also authorized to cut away any limbs interfering with the construction of their line, overhanging the street, but even as to this, he says, the defendant was to pay any damages inflicted on owners of property. He adds, his permits only gave the right of way on the street, but in no case were to interfere with private property, as he did not assume to settle controversies of that kind.

This being so, defendant shows no shadow of right to enter on the premises of plaintiff, and cut the limbs off her trees near the body of the tree, thus greatly disfiguring the shade trees in the yard of a city home, as shown by the proof. It is true, defendant's witnesses insist that the limb could only be cut in this way ; plaintiff swears the contrary, and we see that the fact is as she swears, for it would have been easy, with a self-supporting ladder, to have drawn down the overhanging limbs and sawed them off, and thus remove the obstruction.

Be this as it may, it is clear the court charged correctly, that the defendant had no authority to enter on the premises and cut away the limbs, the plaintiff having positively forbidden the trespass, and a march was stolen on her, and it done at midnight, as said by the employees, a most unusual time for such work. But it is seen from this issue that the question of license to let the limbs grow over the street was totally irrelevant and immaterial in the case. It is true, it is now argued, these limbs were a public nuisance, and might have been abated by any one, but the proof shows no such thing ; on the contrary, it is shown they did not interfere at all with the use of the street by the general public, and we can see their shade over the sidewalk would be grateful to parties walking the street in warm weather, and thus be a public advantage rather than interfere with their use. The limbs only interfered with

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this private corporation in the prosecution of their business in the precise way most convenient to them, as it is shown they might have had their line so located as not to interfere at all with the trees, but at probably less convenience, or, it might be, slightly additional expense. * *

NOTE.—See note to *W. U. Tel. Co. v. Satterfield*, post.

WIDOW J. L. TISSOT ET AL. v. GREAT SOUTHERN TELEGRAPH AND TELEPHONE COMPANY.

Louisiana Supreme Court, Dec. 5, 1887.

(39 La. An. 996.)

ELECTRIC WIRES IN STREETS.—CUTTING OVERHANGING LIMBS.—DAMAGES.

A company which undertakes, under a contract with a municipal corporation, to do a work of public improvement, such as laying a fire alarm telegraph, has no right to invade the premises of an abutting proprietor, and cut off the limbs of trees overhanging the sidewalk, and which do not obstruct the use of the sidewalk, or when the posts and wires could have been, with less or no inconvenience, located elsewhere.

In estimating the damage caused by mutilating ornamental trees, the rule may be invoked that damages are due in cases of unlawful deprivation of some legitimate gratification, although the same are not measurable in money.

Case of this series cited in opinion : *Irwin v. Gt. So. Teleph. Co.*, vol. 1, p. 709.

APPEAL from Civil District Court for the parish of Orleans. Action for damages for trespass. Facts stated in opinion.

Bayne, Denegre & Bayne, for defendant and appellant.

Henry P. Dart, for plaintiffs and appellees.

BERMUDEZ, C. J.: This is an action to recover \$2,500 damages for trespass on plaintiffs' premises, injury done to valuable trees thereon, etc., by employees of the defendant's company, which action is characterized as wanton, malicious, and violative of the rights of petitioners.

After issue joined by a general denial, the case was tried, and a judgment rendered for \$750 damages, from which the defendant company appeals.

The facts do not appear to be disputed; with the district judge, we find them to be the following :

The plaintiffs are the owners of the property, which cost \$12,000 years ago, and has been continually since improved. At a distance of between one and two feet within the front line railing there were four full-grown magnolia trees, planted more than 20 years ago, which had been carefully nurtured and trimmed and which presented an imposing appearance. They were planted two on each side of the entrance gate, at a distance of between 12 and 15 feet apart.

During the summer of 1886 employees of the defendant company entered the premises, and climbing the trees to some 25 feet from the ground, actually did cut off from two of them a number of limbs projecting on the street, so as to leave an open space in the foliage, varying from 25 to 40 feet in circumference.

In justification, the company urges that permission for the cutting of the limbs had been previously obtained ; that the branches projected over and into the street, and were an obstruction, operating as a nuisance, which the city of New Orleans had the right to remove ; that the cutting complained of was done in execution of a contract between the company and the corporation, for the latter's benefit, or public improvement, namely, the construction of a fire alarm telegraph through its streets, over a designated route, under the supervision of the commissioner of police and public buildings ; that the trees in question were on that route, and the limbs cut off were an impediment to the execution of the contract ; that no more limbs were cut

than was necessary, and the legal presumption is that it was done properly.

The company repels the charges of malice and negligence, holding that, in the absence of such, only actual and compensatory damages can be claimed; that there is no proof of real damage, and that punitive damages cannot be allowed.

Hence, error is charged in the judgment below, and its reversal is asked.

The evidence shows that when the acts complained of were consummated, the plaintiffs were away from the State, and that there lived on the premises a female servant, who had a daughter some 12 years old. A gardener occasionally would come, merely to keep the garden in good condition.

There is nothing to show that any authority was obtained from either of the occupants; but, even if there was *proof* to that effect, it could not be considered, for the plain reason that the keepers of the property had been placed upon it for its protection, and not for its destruction, to any extent, and that any permission from them to the contrary was bound to be violative of their trust, and so of no value and protection.

Granting the contract for the building of the fire alarm telegraph with the city, it by no means follows that under that contract, which is absolutely reticent on the subject, the defendant company acquired from the city the right to do that which is charged against it.

There is no doubt that the streets and sidewalks of a city are not subject to any proprietary right or interest on the part of abutting proprietors. *Irwin v. Telephone Co.*, 37 Ann. 67; *Hill v. Railroad Co.*, 38 Ann. 606.

They are things which belong in common to the inhabitants of cities, and to the use of which all the inhabitants of the place, and even strangers, are in common entitled. R. C. C. 455, 458; *Board of Liquidation v. New Orleans*, 32 Ann. 915.

Neither can the right of the city to regulate the use of streets and sidewalks be disputed, for it has that privilege,

not only as an inherent power to its corporate existence, but also because its charter specially vests it with the prerogative.

Board of Liquidation v. New Orleans, 32 Ann. 915; charter 1882, secs. 7 and 8, pp. 20 and 21.

It is well settled that, whether the municipal corporation holds the fee of the street or not, the true doctrine is that it can do all acts appropriate or incidental to a beneficial use by the public, only where it acts in a proper and careful manner, for it is then only that the adjoining proprietor cannot complain.

It is perfectly true that a municipal corporation may, when authorized, expropriate for the purpose of opening streets and making sidewalks, and that it may cut down trees, dig up the earth, and may make culverts, drains and sewers upon or under the surface, grade, and level; in fine, do any proper act which may improve the use of the thoroughfare and enhance public convenience; but that cutting of trees, digging up of earth, and the other acts, must be confined within the limits of the streets which extends over the space between the front lines of property holders, on both sides, sidewalks included. It follows, therefore, the city could not enter the premises of the abutting proprietors, cut down their trees, or dig up the earth on their premises. *Dillon on Municipal Corp.*, 3d. ed. § 688 (544), p. 684.

It is true that under its charter, already cited, the city is expressly vested with the power "*to suppress all nuisances*;" but this must be construed so as to apply to cases of *nuisances clearly so*, to the detriment of public health and public convenience; for otherwise the removal or abatement would be unlawful.

Wood in his treatise on the subject of *nuisances*, substantially uses the following language (sec. 740):

"When the Legislature confers upon the city the power to remove nuisances, this power confers authority, provided the thing be a nuisance, and produces such an injury that an individual injured thereby might remove, but not other-

wise, and if the authorities abate a nuisance, they are subject to the same perils and liabilities as an individual, if the nuisance is not *in fact* a nuisance. * * * It would, indeed, be a dangerous power to repose in municipal corporations to permit them to declare, by ordinance or otherwise, anything a nuisance which the caprice or interests of those having control of its government might see fit to outlaw, without being responsible for all the consequences, and, even if such power is expressly given, it is utterly inoperative and void, *unless* the thing is *in fact* a nuisance, or was created or erected after the passage of the ordinance and in defiance of it.

The fact that a particular use of property is declared a nuisance by an ordinance of the city, does not make that use a nuisance, unless it is *in fact* so, and comes within the idea of a nuisance. Hence, authority conferred by an ordinance of the city is no protection against liability, unless its unlawful character is clearly established. Therefore (except in cases of great public emergency, when the emergency may be safely regarded as so strong as to justify extraordinary measures, upon the ground of paramount necessity, or when the use of property complained of is so clearly a nuisance as to leave no room for doubt on the subject), it is a better course to secure an adjudication from the courts before proceeding to abate it.

The author next proceeds, enumerating the recognized cases in which municipal corporations may abate nuisances.

In the present instance, there is nothing to show that the overhanging of limbs of trees on the sidewalks from within the property has ever been declared by law or ordinance or even considered as a nuisance.

In a case in which it was claimed that a veranda, extending over a sidewalk, was a nuisance, as being an obstruction of light and view, which ought to be abated, a previous court said that, as to verandas of the kind erected by the defendant, which the evidence shows to have become so common of late years, they are obviously, so far as the public is concerned, a great improvement as compared with

the hanging galleries and wooden sheds which extend only to the half or the third of the width of a sidewalk and from which the drip in rainy weather is so great an annoyance to foot passengers. These modern verandas, on the contrary, afford a perfect shelter from the sun and weather to passers by the front of the houses to which they are attached. In sultry climates, the necessity of shade from the sun, to health and comfort, has universally introduced the custom of balconies or verandas, which, in this respect, are equally beneficial to the inmates of the houses and to wayfarers. *Durant v. Riddell*, 12 Ann. 747.

It is to be noted that the property in the instant case is situated in the suburban or rural part of the city, in front of a water-course, known as "bayou," and that right next to the trees, on the street side, there exists a small sidewalk of between two and three feet in width.

To those who live in this climate, particularly during the hot summer months, when the thermometer points to about 100, when not more, it would be needless to argue that the over-hanging of branches of magnolia trees on such sidewalks is no nuisance, but, on the contrary, actually proves of great relief, not only against the heat, but also sometimes even against the rain itself.

The court can take judicial notice of the fact, that on many sidewalks in the city and its suburbs or outskirts, there has been planted a number of trees, and it knows that this is done with the formal sanction of the municipal authorities, though subject to its good pleasure only. Jewell's Dig. 519.

The principles announced by Wood were expressly recognized in this State, in *Kennedy v. Phelps*, 10 La. 227, and Jewell's were enforced in the case of *Pontchartrain R. R. Co. v. New Orleans*, 27 Ann. 162, in which the city was condemned to pay \$30,000 for having pulled down the depot of the company, which had been considered a nuisance, and which was not in fact such.

The same views were entertained in the case of *City v. Wire*, 20 Ann. 500, in which a contractor, who, in laying the

pavement on a banquette on one of the streets, took up or destroyed common shade trees which had been planted there, was held liable in damages, and condemned accordingly, although he claimed not to have acted with malice.

The defendants have called our attention to what was said in the *Case of the Earl of Lonsdale*, 2 B. & C. 311, by Mr. Justice BERT, and which is to the effect that the permitting the branches of trees to extend so far beyond the soil of the owners of the trees is an unequivocal act of negligence which the injured party may abate without notice ; but the learned justice adds that the security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the nuisance has arisen to remedy it, and that, in all other cases, persons should not take the law into their own hands, but follow the advice of Lord Hale, and appeal to a court of justice.

It may well be that, under the circumstances under which the litigation arose, the learned justice thought himself authorized to announce what he deemed to be a principle, but, from his own language, this course could be justified only where security to life and property would require a speedy remedy.

In France, whose system derives from the Roman law, from which we have borrowed the great bulk of our legislation, the code provides with more regard to the rights of ownership, that he on whose property the branches of the trees of the neighbor overhang may compel the latter to cut those branches. C. N. 672.

It further declares, however, that if it be the roots that have encroached, he has the right to cut them himself. Same article.

Our code, art. 691, on the subject, is to the effect that if the neighbor suffers any damage from the trees, he can oblige the owner to have them torn up or their branches cut off, which extend over his estate. It makes the same provision as the French code when the roots invade his estate.

Had, by some accident, the limbs of the trees on plaintiff's property been detached therefrom, and fallen across the sidewalk, remaining there, so as to prevent the use of it by wayfarers, there is no doubt that the city or any person injured, could have had the right, the obstruction proving a nuisance, the necessary remedy having to be applied at once, to remove it some way or other without any notice to the proprietor of the trees, even had it been necessary to enter upon the premises as an indispensable means to accomplish the removal, but doing no more damage than would be essential to effect the object, remaining liable for any wanton or uncalled for injury. The existence of the emergency alone would justify the interference. U. S. Dig., Vol. IX, "Nuisance," p. 649, Nos. 62, 63, 67 and 68; Cooley on Torts, 47.

It is upon this principle that, while recognizing the rights of the defendant to put up poles and run wires thereon, this court has, in the *Irwin case*, 37 Ann. 67, relieved the defendant, because the right had been exercised with as little inconvenience as possible to the plaintiff and to the public.

The argument is fallacious, and a begging of the question, that, in this case, although the limbs were not strictly a nuisance, they were obstacles in the way of a public necessary improvement, which had to be instantly removed; for it is not found that it was actually impossible to put up the posts and run the wires at any other place or otherwise than through the space occupied by the branches and the foliage.

It is apparent, from an inspection of the map or plat in evidence, that it would have been easy to have planted the telegraph posts, and run the wires on them, on the other side of the street, on the embankment of the bayou, without interfering with the towpath used for cordelling schooners and other crafts up and down the water course.

It is likewise manifest that, even if the posts could not have been erected elsewhere, there existed no reason whatever to cut the limbs of the trees, so as to leave in the foli-

age an open space ranging from twenty-five to forty feet in circumference, or eight to thirteen feet in diameter for the mere purpose of running through that space an almost imperceptible wire.

It remains to be known how long it will take for other limbs and other foliage to grow which will fill up the large opening thus unnecessarily made.

In the mean time the injury done has surely not been fully repaired.

While treating of the right which a party may have of removing, *himself and without notice*, a nuisance really so, Cooley, in his work on Torts, says: The fact that he is taking the law into his own hands imposes upon himself a special obligation to keep clearly within the necessity which justifies it, and if he is guilty of *wanton* or unnecessary violence, he is liable for the excess.

From the premises it clearly follows that as the overhanging of the limbs cut by the employees of the defendant company was not a nuisance, and surely not such as required and authorized an immediate removal by the city, the company, or any other person, the entry on the premises and the cutting were wanton acts which constitute a trespass, and an infliction of injury to property and feelings, which demands the allowance of compensation to the injured party. That party in default is surely not the city, for it never, expressly or impliedly, directly or indirectly, authorized any one of its officials, or even the defendant company, to commit the trespass or inflict the damage. So that the responsibility rests upon the defendant company alone, whose employees represented it and did the acts complained of, in the performance of service assigned to them in the ordinary course of their employment, and which acts the company could have prevented by giving proper instructions or pursuing some different course. While the rights of corporations will be recognized, the obligations under which they are placed to respect those of others must be enforced.

It is hardly necessary to refer to authorities to show that

the acts done constitute a trespass and entitle the plaintiffs to an indemnity. Attention, however, is called to Sutherland on Damages, vol. 3, pp. 364, 374, 385, 398, 469; Cooley on Torts, 63, 64; R. C. C. 1934; *Delacroix v. Villere*, 11 Ann. 39; *City v. Wire*, 20 Ann. 500; *Hardy v. Stevenson*, 29 Ann. 172; *Keene v. Lizardi*, 8 L. 26; *Brulard v. Calhoun*, 13 Ann. 445; *Salt Lake City v. Hollister*, 118 U. S. 256, and authorities therein, all referred to in the elaborate opinion of our learned brother of the District Court.

It is evident that the plaintiffs have sustained injury in the wanton invasion of their premises, in the unjustified destruction of their property, in the deprivation of material, physical and moral enjoyment, in the endurance of aggrieved feelings, and in the apprehension of a possibly irremediable wrong, for all of which they are entitled to compensatory damages.

The law on the subject of assessments of damages in cases of offences and *quasi* offences leaves much discretion to the judge or jury. R. C. C., 1928.

The evidence shows the value of the trees, what it would cost to replace them, how long it would take for the newly planted trees to acquire the size of those mutilated. It establishes that these were ornaments to the property, planted by Mr. Tissot. It does not put a value upon the disappointment, mortification, and other sufferings of the plaintiffs, as such things cannot be said to be measurable and appreciable in dollars, though, when there has been a mental endurance, some adequate pecuniary compensation must be made.

The Code provides that, in cases of unlawful deprivation of some legitimate gratification, although the same are not appreciated in money, yet damages are due. R. C. C. 1934; *McGary v. City of Lafayette*, 4 Ann. 440; *Black v. Railroad Co.*, 10 Ann. 33. We deem that, under the circumstances, the damage done is daily being repaired, and that, in the course of time, it will hardly be perceptible, so that the original condition of things will be fully restored. We do not think, however, in the absence of any fixed rule

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for the allowance of such damages, that the plaintiffs are entitled to recover the amount allowed below. It is, therefore, adjudged and decreed, that the judgment of the lower court be amended so as to allow the plaintiffs four hundred dollars (\$400) instead of seven hundred and fifty dollars (\$750), and thus amended, it is affirmed, appellees to pay costs of appeal.

NOTE.—See note to next case.

WESTERN UNION TELEGRAPH COMPANY v. MARY E.
SATTERFIELD.

Appellate Courts of Illinois, March 1, 1889.

(34 Ill. App. 386.)

TELEGRAPH COMPANY.—CUTTING TREES.—TRESPASS.

It being part of the duty of an agent of a telegraph company to cut trees upon adjacent land whenever they were, or might be, in his opinion, dangerous to the telegraph line, if he err in the exercise of such discretion and commit trespass in cutting particular trees which he believes to be dangerous, he is acting in the line of his duty, and the company is liable in damages for the trespass.

APPEAL from the Circuit Court of Jefferson county.

George B. Leonard, for appellant.

Pollock & Pollock, for appellee.

PHILLIPS, J.: Action for trespass brought by appellee against appellant, for cutting timber. A trial by jury was had, and a verdict and judgment for \$100. There is no controversy as to the fact of the injury and the amount of damage.

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The question presented is, whether the cutting was by the agent of the company, or under his direction, and whether, if so done, the agent was acting within the line of his employment. Corporations can act only by agents, and where a person acts openly and publicly as the agent of a corporation, we must presume authority in persons who are permitted to so act for them. *R., R. I. & St. L. R. R. Co. v. Wilcox*, 66 Ill. 417.

The evidence shows that the poles that sustain the wires of the telegraph company stand in the right of way of the Louisville & Nashville Railroad Company, and about twenty-five feet from the center of the track. Adjoining the right of way, and near the line of the telegraph company's wires, the trees, the cutting of which is the subject-matter of this suit, were standing.

T. E. Robson, the road-master, testifies that "Mr. Karberry was line repairer for appellant; have seen him repairing wires and putting up poles; he was often doing such repairs. The duty of the line repairer is to examine lines and wires, see that the lines are not obstructed, remove trees or anything dangerous."

M. F. Jolly testifies that he "was section foreman of the section along which the cutting was done. The chopping was done under the direction and control of Mr. Karberry, who was in the employ of the telegraph company, and was present and pointed out the trees to be cut, and no cutting was done except of trees thus pointed out."

Under the direction of Karberry, trees twenty-five feet or more south of the right of way were cut. Witness was directed by the assistant road-master to report with his men to Karberry, and cut such trees as might be pointed out. That Karberry was the line repairer for appellant, and his duties were such as stated by Robson, is not controverted, nor is the fact that he directed the cutting of the trees. Being so in the employ of the company, it was his duty to remove trees or anything dangerous to the line.

The determination of what might be dangerous was thus left to him. If, in determining that particular trees were

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dangerous, or might be so, he was mistaken in the exercise of a discretion left to him, it is still his act, in the discharge of his work of removing trees or anything dangerous to the line, as determined by him. If, in determining what might be dangerous to the lines of the company, he believed the trees on appellee's land were so, and to remove them committed a trespass, that trespass was committed by the agent of the company, in the discharge of his duties to the company, as he determined those duties, which were by the company left to him to determine. It was therefore in the line of his employment. Cooley on Torts, 538; *C., St. P. & F. R. R. Co. v. McCarthy*, 20 Ill. 385; *P. & R. R. Co. v. Derby*, 14 How. 468; *Rounds v. Del., etc., R. R. Co.*, 64 N. Y. 129; *Howe v. Newmarch*, 12 Allen, 49.

We therefore hold the appellant was guilty of the trespass charged. We find no error in the giving or refusing instructions, and the judgment is affirmed.

Judgment affirmed.

NOTE.—In *Gilchrist v. The Dominion Telegraph Company*, Supreme Court of New Brunswick, 8 Rugsley & Barbridge, 553, affirmed. without opinion, by the Supreme Court of Canada, the action was in trespass for cutting off branches from trees overhanging a highway. It arose as follows:

A statute gave the defendant the right to go upon land and take such part as should be necessary for its line; to go upon the land to make surveys and set out and ascertain such parts as it should think necessary; and to build its line, "as and where the said company shall think necessary and convenient." "Provided, always, that the said company shall not cut down or mutilate any shade or ornamental tree, unless it shall be necessary for the erection, use or safety of its line."

The statute provided for the appointment of an arbitrator to settle disputes as to the land to be taken or damages to be paid.

The trees in question were on one side of the road.

The defendants pleaded that they thought it necessary to cut the branches. The plaintiff, in demurring to the plea, set up that there were trees on only one side of the road, and that the telegraph line might have been built on the other side.

The court sustained the demurrer, holding that it was necessary for the defendant to allege and prove the actual necessity of the act complained of.

Also held that the arbitration clause of the statute did not apply in such a case.

WILLIAM B. SHELDON v. THE WESTERN UNION TELE-
GRAPH COMPANY.

New York Supreme Court, General Term, Second Dept., Feb. 11, 1889.

(51 Hun. 591.)

USE OF HIGHWAY BY TELEGRAPH COMPANY.

The use of a highway by a telegraph company for the maintenance of its line, though with legislative permission, being subject to the public use, the company must not obstruct the road so as to make it dangerous for public travel.

Therefore *held*, that for injuries caused to a traveler using due care, by collision of his carriage with a guy-wire used to support its poles, the telegraph company was properly found liable.

ACTION for damages. Trial at Circuit, Dutchess county. Appeal by defendant from judgment on verdict for plaintiff and from order denying motion for new trial upon the judge's minutes. The facts appear in the opinion.

Herbert E. Dickson, for appellant

William R. Woodin, for respondent.

BARNARD, P. J.: There is some conflict in the testimony upon minor points, but upon the whole it is clearly proven that the defendant operated lines of telegraph wire along the road in question; that it maintained a telegraph pole at a point where there was an angle in the road, so that the tendency was that the pole would fall away from the road. This pole was quite close to the fence. To prevent the pole from falling away from an upright position, the defendant sank a stone close to the traveled part of the highway and fastened a wire to it, and carried the wire to the telegraph pole above ground, and attached it to the pole. By means

of this anchor and wire, the pole was held firm. There were two apple trees on the same side of the road as the anchor stone, which, when in leaf, prevented the wire being seen by persons using the highway. There was a bank on the opposite side of the road, which forced the travel close to the sunken stone. The accident happened in August, 1886, and about 6 o'clock in the afternoon. The plaintiff was driving a team of horses along the road. A man with a wagon was ahead of him, and this man pulled his horses towards the bank to let plaintiff go by. The plaintiff turned out far enough to escape the wagon, and in doing this the wire caught the carriage of plaintiff between the box and the wheel, and caused great injury to the plaintiff. He was pulled out of the wagon by the horses, which were freed from the carriage by the force of the collision with the wire. The question is a peculiar one in this, that both parties had a right to use the road: the plaintiff because it was a public highway, and the defendant because of legislative permission to use the highway. The first question is, which right is paramount? Highways are well established and defined in law. The right to use them as they have been accustomed to be used from time immemorial cannot be questioned. The right of the defendant is subject to the public user. The defendant may not use the road so as to obstruct or render dangerous the public travel. If this correctly states the rights of the parties, a case of injury by negligence of defendant is clearly made out. The wire between the stone and the pole was not easily seen under favorable circumstances. The wire was so close to the road that it was a dangerous snare to travelers, and, besides this, the road was so narrow by reason of the bank, and the traveler's view was so obstructed by the trees, that the jury were justified in finding the defendant guilty of negligence.

The evidence fails even to make a debatable question in respect to the plaintiff's negligence. He did not see the wire because he could not for the trees and the invisible nature of a small wire between the stone and the pole. He

turned out no further than was prudent to pass. The persons in each vehicle so testify, and the anchor was so close to the traveled part of the highway as to cause a collision under these circumstances.

There are several exceptions to the refusal to charge specific requests. The general charge is faultless, and the requests were all either addressed to propositions which had no evidence to support them, or were addressed to the effect which certain findings upon particular facts would have upon the general question of negligence and contributory negligence, which was submitted to the jury upon the general evidence in the case. The refusal to charge on such propositions was not erroneous, where the charge as to the general question of negligence was plain and accurate. The damages found by the jury were moderate, and fully justified by the evidence. The judgment should therefore be affirmed, with costs.

PRATT, J., concurred.

Judgment and order denying new trial affirmed, with costs.

NOTE.— This case was affirmed by the Court of Appeals, without opinion, in 121 N. Y. 697.

See INDEX to this and to prior volume, title, "Poles and Wires in Streets: Duty to the Traveling Public."

Also, note, 1 Am. Elec. Cas. 262.

In *Wolfe v. Erie Telegraph and Telephone Co.*, U. S. Circuit Court, Eastern District of Texas, decided Dec. 10, 1887, reported 33 Federal Rep. 320, the plaintiff sought to recover damages for injury caused by the collision of his buggy with a telephone pole, the horse having become frightened and run into the pole. The court charged that the defendant had sufficient authority from the city to erect the pole, and that the only question for the jury was whether or not the pole was a dangerous obstruction. Upon the legal question involved he charged as follows:

"Again, when a public street has been once lawfully opened and has become a public highway, the sovereign power may abolish it or change it, but there is no power, except in time of war or public calamity, that can lawfully authorize the permanent erection of an obstacle dangerous in its character to the persons or property of the public in traveling to and fro therein. The grant of a permit or direction to locate a pole or post in a street extensively used by the public as a general thoroughfare, both

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for pleasure drives and business vehicles, in order to be a valid grant, or to be rightfully there, must not only be in accordance with the authority ordinarily conferred by statutes and ordinances, but must also be made subject to the determination of a jury as to whether the pole or post so located is in point of fact dangerous to the public in the use of such street, including all the contingencies incident to the lawful use of the same."

Sheffield v. Central Union Telegraph Co., U. S. Circuit Court, Northern District of Ohio, Eastern Division, April, 1888, 36 Fed. R. 164, was also a collision case, and the trial judge said in his charge :

"The statutes of Ohio provide that the telephone company might occupy for its poles a part of the public highway, but must not do it so as to incommode the public in the use of the highway. In the location of its poles in the highway the defendant was required to exercise reasonable care, so as not to incommode persons having a right to use the road for all purposes of travel. This use means the ordinary and reasonable use of the highway for all purposes for which highways are usually used by the public."

In *W. U. Tel. Co. v. Eyser*, 91 U. S. 495, note, reversing 2 Col. 141, the agents of the telegraph company were engaged in putting up a wire, and it was about two feet from the ground when the plaintiff came along on horseback and his horse became entangled in the wire, causing the injury complained of. The judgment for plaintiff was reversed for error of the trial judge in charging the jury that they might allow compensatory damages. But the appellate court say : "The omission to station flag sentinels or to give some other proper warning, while the men were engaged in putting up the wire, was an act of negligence, entitling the plaintiff to compensatory damages."

Pennsylvania Teleph. Co. v. Varnau, 15 Atl. R. 624 (Supreme Court of Penna. 1888) was an action brought by the wife and infant child of a man whose death had been caused by collision of his load of furniture with a telephone wire. The principal questions raised were as to contributory negligence and burden of proof.

A case not based on negligence of an electrical company, but still relating to the respective rights of such companies and of the traveling public, in highways, is *N. Y. and N. J. Teleph. Co. v. Dexheimer*, 11 N. J. Law Journal, 246, which gives the charge to a jury. The defendant, for the purpose of moving a house, had cut certain wires belonging to the plaintiff. A city ordinance permitted wires to be maintained at the height of not less than twenty feet, and the trial judge charged that as to all wires under that height the defendant was justified, but not as to those of greater height ; and submitted to the jury simply the question of fact as to the height of the wires.

THE TRUSTEES OF THE VILLAGE OF GENEVA, Respondents,
v. THE BRUSH ELECTRIC COMPANY OF CLEVELAND,
Appellant.

N. Y. Supreme Court, General Term, Fifth Dept., Jan. 11, 1889.

(50 Hun, 581.)

POLES IN STREET.—RECOVERY OVER.

An electric lighting company, which merely uses, with the consent of a municipal corporation, a pole which had been placed by another company, is not liable to recovery over at the suit of the municipality upon the latter's being defeated and the pole adjudged a nuisance as to its location but not as to its use, in an action brought by one who had received personal injuries because of it.

APPEAL by defendant from a judgment recovered at Circuit, Ontario county. A runaway horse had collided with an electric light pole. The village trustees having been sued and a judgment recovered and paid by them, this action was brought to recover over against an electric light company then using the pole.

Wm. E. Cushing, for appellant.

Arthur Rose, for respondent.

DWIGHT, J.: This was an action over, by the plaintiffs, on a judgment recovered against them by one Maloney for personal injuries caused by an obstruction maintained by the defendant in one of the streets of the plaintiff's village. The defendant was under a contract with the plaintiffs to light the streets of the village by electricity. A contract to that purpose was first made in May, 1884, with the "Brush-Swan Electric Light Company of New England." Under that contract the plaintiff designated the places

where the electric lamps should be put, one of which places was at the intersection of Exchange and Jackson streets. Thereupon the Brush-Swan Company, early in June, 1884, for the purpose of supporting the lamp so located, erected the pole which constituted the obstruction complained of in the action of Maloney. It was erected on the east side of Exchange street, and, together with a pole diagonally opposite on Jackson street, served to support the wires from which a lamp was suspended over the intersection of the two streets. Afterwards the Brush-Swan Company transferred all its rights and interests under the contract above mentioned to the defendant; and on the 5th of December, 1884, the latter company entered into a contract with the plaintiffs, by which it undertook, with unimportant modifications, "to fulfil the conditions of the said agreement of the Brush-Swan Electric Light Company." On the 2nd of June, 1885 (the above-mentioned contracts having expired by limitation), the parties to this action entered into a new contract to the same purpose, which contained the provision: "Lamps to be about thirty-five feet high, and to be as now located;" and on the 10th day of the same month the accident occurred which was the basis of the former action. The pole then stood as it had been originally placed by the former contractor, a year before. No objection had ever been made by the plaintiff to its location, but, on the contrary, as the court below expressly finds, it had been permitted to remain there "by the consent of the plaintiffs." This finding is one of fact, made in response to the request of the defendant, and is, of course, conclusive upon the plaintiffs, who have neither appealed from the judgment, nor excepted to any of the findings. There is a further finding to the effect "that general directions were given to the agent of the Brush-Swan Electric Company to set said pole inside of the curb." This finding was excepted to, and seems to have been without evidence tending to sustain it. Code Civ. Pro., §§ 992, 993. There was no direction which specified or included this pole. The only general direction given, at any time,

on the subject of the location of poles, related to those employed in an experimental circuit which was set up by the Brush-Swan Company, before any contract was made, and which did not include the pole or the location in question. We have, then, the affirmative finding that the plaintiffs consented to the maintenance of this pole by the defendant in the position in which it was located when the contract was assumed by the latter, and in which it remained when the injury was sustained for which judgment was recovered. By that judgment the pole so located was adjudged to be a nuisance, for which the plaintiff was responsible to the party injured. But the court, at the circuit, found as a conclusion of law that "as between the plaintiff and defendant herein the pole in question was not maintained by the concurrence of the plaintiff." It is not made quite clear what distinction was intended between the terms "consent" and "concurrence," or in what sense it can be said that this pole was maintained with the consent, and without the concurrence, of the plaintiffs. If the maintenance of the pole had involved any affirmative action on the part of the defendant, it might have been said that such action was without the participation or co-operation of the plaintiffs; but, as we have seen, no such action was involved. The defendant had neither set, nor reset, [nor repaired the pole. It had simply left it (with the consent of the plaintiffs) where it was placed by the former contractor. Or if the injury for which recovery was had, had resulted from the use of the pole, it might properly have been found that the plaintiffs did not participate in such use. But it must be observed, it was in the location, and not in the use, of the pole that the nuisance consisted. No wrongful or negligent use was alleged or proved. The injury to Maloney resulted, not from any use of the pole, but only from its location. That it was permitted to remain in that location, with the consent of the plaintiffs, is affirmatively found; and, as we have seen, no further concurrence on the part of the plaintiffs was, in the nature of the case, possible. Under these circumstances, consent and

concurrence seem to be convertible terms. Such being the case, the plaintiffs are in the position of joint wrong-doers—in the same fault with the defendant—and hence not entitled to claim indemnity or contribution from the latter.

The general rule, which denies indemnity or contribution to joint wrong-doers, is elementary. The cases in which recovery over is permitted in favor of one who has been compelled to respond to the party injured are exceptions to the general rule, and are based upon principles of equity. Such exceptions obtain in two classes of cases: *First*, where the party claiming indemnity has not been guilty of any fault except technically or constructively, as where an innocent master is held to respond for the tort of his servant acting within the scope of his employment; or, *second*, where both parties have been in fault, but not in the same fault, towards the party injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury. Very familiar illustrations of the second class are found in cases of recovery against municipalities for obstructions to the highways caused by private persons. The fault of the latter is the creation of the nuisance; that of the former, the failure to remove it in the exercise of its duty to care for the safe condition of the public streets. The first was a positive tort, and the efficient cause of the injury complained of; the latter, the negative tort of neglect to act upon notice, express or implied. Of the latter class are the cases, cited by counsel for the respondents, of *The Village of Port Jervis v. First National Bank*, 96 N. Y. 550; *Village of Seneca Falls v. Zalinski*, 8 Hun, 575; *City of Rochester v. Montgomery*, 72 N. Y. 65; *Lowell v. Boston and Lowell Railroad Corporation*, 23 Pick. 24. The case at bar is distinguished from these and all similar cases, by the fact, affirmatively found by the court, that the plaintiffs consented to the maintenance of the pole in the position in which the defendant received it from the former contractor. In most of the cases of this class the notice to the municipality, which

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charges it with negligence, is constructive merely (see *Lowell v. B. & L. R. R. Corporation, supra*); but, even though the fact of negligence be established by proof of express notice, the fault of the municipality is negative, and the latter is not in the same fault, or *in pari delictu*, with the wrong-doer. To this case we think the language of the court, by ALLEN, J., in *Johnson v. Oppenheim*, 55 N. Y. 280, is fully applicable: "As one who has consented to an act cannot maintain an action for any loss sustained by him, so no one can avoid an obligation or relieve himself from a duty to another, by the act of a third party to which he has consented." On the grounds indicated we think the first conclusion of law, to the effect that the pole in question was not maintained with the concurrence of the plaintiffs, and the final conclusion, that the plaintiffs are entitled to recover against the defendant, were not warranted by the findings of fact, or by the evidence in the case. For these reasons the judgment should be reversed and a new trial granted; costs to abide event. All concur. Judgment reversed and new trial ordered; costs to abide event.

NOTE.— See note to preceding case.

CENTRAL UNION TELEPHONE COMPANY v. THE SPRAGUE
ELECTRIC RAILWAY AND MOTOR COMPANY AND THE
AKRON STREET RAILROAD COMPANY.

Common Pleas Court of Summit County, Ohio, January, 1889.

(From private print.)

WIRES IN STREETS.— INTERFERENCE.— INJUNCTION.

In an action for equitable interposition of the court to compel an electric railway company to so arrange its wires and convey its electric current as not to interfere with a telephone system, held (the fact of substantial interference being established and found):

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First. That if the question depended on priority, the defendant was first in the field, and the plaintiff accepted its privileges in the streets, subject to existing conditions.

Second. That the municipal authorities had no power to and did not grant exclusive privileges to either company, and that neither could maintain an action to restrain the other from constructing and maintaining its line, if done in a proper manner.

Third. That the proof did not satisfy the court that the use by the railroad company of a return trolley wire would remedy the difficulty.

Fourth. That if the use of a metallic circuit by the telephone company would protect its system, its remedy at law would be complete, the measure of damages being the expense incurred in perfecting the metallic circuit.

ACTION for injunction. The facts are sufficiently stated in the opinion.

Alfred A. Thomas and *E. W. Stuart*, for plaintiff.

John S. Wise, for defendant Sprague E. R. & M. Co.

Andrew Squire and *Oviatt Allen*, for Akron Street Ry. Company.

E. P. GREEN, J.: We consented to allow proof upon final hearing of this case to be made by affidavits, a very unsatisfactory way of determining facts, but having so heard it, we are now compelled to decide it on such proof.

Petition says plaintiff is a corporation duly organized for purpose of constructing and operating telephone exchanges and telephone lines connecting different points and is duly authorized to do so in Ohio.

That the mode of use by said plaintiff of the streets or public ways of the city of Akron for telephone purposes was agreed upon and prescribed by ordinance passed in 1883, and continued by ordinance passed September 3, 1888, for a further period of five years from said last-named date; that by said laws and ordinances plaintiff is authorized to construct and maintain upon the streets of said city the poles, wires and fixtures convenient and necessary for supplying to the citizens of said city and the public com-

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munication by means of a telephone exchange and toll lines to distant towns.

That with such full legal authority and right thus to do, it has, at an expense of many thousand dollars, constructed and is operating said telephone exchange and toll lines, and has been and is deriving a large revenue therefor.

That to carry on its said exchange business it is necessary to have a delicate and complicated mechanism, known as a switchboard, from which radiate separate wires to telephones located on patrons' premises, which there have an electrical connection of wire running into the ground.

Plaintiff says that all this was fully constructed, and it was in the full possession of said rights, and so in full possession of said business long before and up to the commission of the acts and wrongs hereafter set forth, and is only prevented by said acts from in the same manner continuing and extending said business.

The Akron Street Railway Company is for years to come authorized to build and operate a street railroad with cars drawn by horse power, on the streets of Akron, and did so until it attempted to abdicate its franchise as hereinafter set forth.

That on July 8, 1888, said defendant, the Akron Street Railroad Company, did incorporate under the laws of this State, having the following powers, and none other, to wit: "Owning, acquiring, building and operating street railroads and doing all things connected therewith and incidental thereto," and that this company bought and took possession of said first named street railway company's entire road and plant; that on July 2, 1888, said city council passed "An ordinance authorizing John S. Casement and his associates to reconstruct said street railroad then in operation, and to construct and operate a street railroad in said city, in and along Market street from the west corporation line to Factory street, and in and along College street from Market street to Middlebury street, and in and along Middlebury street from College street to Spicer street, and in and along Spicer street to

Exchange street; thence along Exchange street to Main street, with the necessary wires and poles to adapt said street railway to the use of electricity as a motive power, for the period of twenty-five years from the passage of the ordinance."

Plaintiff says that by said ordinance said city council did not continue existing rights into an intended route, nor did it by following any of the requirements of the statute, duly authorize the construction of any new railroad, and that no rights could be or were created or acquired by anybody by virtue of said ordinance.

Plaintiff avers that by the powers conferred on it by its incorporation and by said ordinance and by section one of the act of the Legislature of said State, passed May 12, 1886, and the act passed January 26, 1887, and by no other power or authority, said Akron Street Railway Company, defendant, claims the right to propel its cars along said entire route, by a heavy and dangerous electrical current, carried low down over its cars, on a bare and uninsulated wire, along the center of said streets, and along many other streets, to engage in the business of supplying to other persons and business electric power; and that said company is threatening and is about to erect poles on Forge street (not included in the above street railroad ordinance), and for said last named purpose alone.

Plaintiff says that defendants have already caused uninsulated wires to be constructed on Market and Howard streets, and are there propelling cars thereby, and are threatening and are about to further extend said lines in the manner and for the purpose aforesaid.

Plaintiff avers that all of said electrical propulsion of cars can be successfully and practically done by said Akron Street Railroad Company, defendant, as it desires, if it will do the same by means of a metallic circuit or return wire, whereby said electrical current will be brought back above ground to said company's generator; but that its present method of construction and operation of its said electrical wires is greatly and needlessly dangerous to life

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and to the safety of the whole community and of plaintiff and its patrons, from fires caused by contact with defendants' wires, and that its present methods and doings thereunder have damaged and will unlawfully, greatly and needlessly interfere with and damage said business of plaintiff, as is now more fully explained.

Instead of constructing and using such return wire for said electrical currents, said defendants are carrying said currents from their trolley wire along the center of said streets into each car, and thence through the motor and wheels to the rail beneath and a wire laid under and connected with the rail, thus completing their circuit.

For this reason it follows that as each car moves past the near neighborhood of telephones on the premises of the said plaintiff's subscribers, the following effects are produced :

First. The subscribers to the plaintiff's telephone exchange are frequently debarred from securing any telephone service by the derangement of the signalling instrument at the plaintiff's central office, and said instruments are rendered incapable of use for a considerable length of time thereafter.

Second. The call bells which are necessarily a part of the plaintiff's telephone machinery, and which are located in the premises of the subscribers to said telephone exchange, are frequently rung by false signals.

Third. Loud and interfering noises are produced in the telephones in said plaintiff's central office, and on many of the wires connected therewith.

Fourth. The plaintiff's wires or toll lines connecting other cities and towns are greatly impaired, and communication thereon, for which long and costly lines have been constructed, is often prevented.

Plaintiff says that said Sprague Electric Railway and Motor Company, defendant, has entered into a combination or contract with its said co-defendant to do the acts and wrongs above set forth.

Plaintiff says that while all of said defendant's business

is comparatively new and experimental, yet enough is known to make sure that such street cars can be propelled by an electric current carried on overhead wires, without any interference with existing telephone wires, situate as the same are in the city of Akron, that such cars are now so propelled in other cities in said State of Ohio and elsewhere, without any interference with or damage to the successful operation of telephone wires, and because the said precautions and arrangements of such motor wires were then observed and followed and not neglected.

That said defendant proposes and threatens further use and extension of its wires by said defendant Railroad Company, and that the poles erected and threatened to be erected are not located and arranged so as not to interfere with the successful operation of said telephone wires, which have been for many months and are now existing as hereinbefore stated.

Said defendants both have had knowledge and notice of said damage and interference, and have been requested by plaintiff to correct the same, but have failed, and now refuse to do so. Said plaintiff avers that by reason of said acts of said defendants, plaintiff's damages are continuous and without adequate remedy at law.

Plaintiff asks that the court will require defendants to cease said interferences, to correct their arrangements of wires, and said injurious manner of disposing of said electric current, and for other relief.

To the claim of plaintiff, defendant, the Akron Street Railroad Company, answers, denying each and every statement of plaintiff, except it admits plaintiff is a corporation duly organized for purposes stated ; that the Akron Street Railroad Company has been, and still is for years to come, authorized to build and operate street railway with cars drawn by horse power, and did so build and operate the same.

It admits that it is incorporated and has powers as stated in the petition, and that it has purchased and taken possession of the entire road of the Akron Street Railroad Company.

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It admits that on July 2, 1888, council passed an ordinance granting privilege of constructing and operating electric railway.

It admits that it has constructed innumerable wires on Howard and Market streets, and is propelling cars by electricity conveyed on said wires.

It admits that the current is conveyed through the trolley to the earth. It admits the interference with the plaintiff, and the request to remedy the interference in manner described, and has refused to do so.

And further answering, says that before the passage of the ordinance of September 3, 1888, it had become the owner of and succeeded to the rights and privileges conferred upon J. S. Casement by the ordinance of July 2, 1888, and since such acquisition has been in full possession and enjoyment, as it had a right to be, of said privileges.

And says if the propelling of its cars in any way interfere with business of plaintiff, plaintiff can effectually remedy it by the erection and use of a metallic circuit or return wire, and asks to be dismissed with its costs.

The Sprague Electric Railway and Motor Company answers, denying each and every statement in the petition, except such as are admitted to be true or qualified.

It admits that the plaintiff is a corporation duly organized for the purpose of constructing and operating telephone lines and exchanges, and that it is now maintaining and operating a telephone exchange and toll lines in the city of Akron.

It denies that the mode of use by the plaintiff of the streets and public ways of the city of Akron for telephone purposes was agreed upon and prescribed by the city council of said city either in 1883 or at any time thereafter.

It denies that the plaintiff has fully constructed its telephone equipment in the city of Akron, as set forth in said bill, or that it was in full possession and exercise of any rights it now enjoys in Akron, before the rights now

exercised by the Akron Street Railroad Company were granted to it.

It denies that the plaintiff enjoys any exclusive right to the use of the streets and public ways of the city of Akron for any purpose whatsoever.

It admits that the Akron Street Railway Company has been, and still is for years to come, authorized to build and operate a street railroad with cars drawn by horse power, as averred in the petition, and that said railway company did build such railroad and did operate the same.

It denies that the defendant, the Akron Street Railway Company derived its power to erect its electrical street railway equipment under the statute passed May 12, 1886, and of the act passed January 26, 1887, cited by said plaintiff.

It denies that said Akron Street Railroad Company claims the right to propel its cars along said route, or does propel the same, by a heavy and dangerous electrical current. On the contrary, the respondent avers that said electrical current is not dangerous.

It admits that said electrical current is supplied to the motors on the cars of the said Akron Street Railroad on a bare and uninsulated wire running along said route above the center of its track; but it denies that said Akron Street Railroad Company runs said bare and uninsulated wire, or any other sort of electrical wire, along many other streets than those upon which its route is located to engage in the business of supplying to other persons and business electric power.

It admits that the electrical current from said uninsulated wire above the cars of the Akron Street Railroad Company, which wire is known as a trolley wire, is carried by means of a device known as a trolley wheel, which is on the end of a pole on top of said cars, and is kept in contact with said trolley wire, down to the motors on said car to acquire electrical propulsion, and that thence said electricity passes through the wheels and rails, and by means of copper wires and ground plates, to the earth, and thence,

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using the earth as a conductor, the electrical circuit is completed by means of such rails, wires and earth, back to the generators of said electrical current.

It denies that said electrical propulsion of cars can be successfully or practically done by said Akron Street Railroad Company by means of metallic circuit or return wire, as set forth in said bill, and it denies the right of the plaintiff to dictate to it that it shall resort to that method of electrical propulsion.

It denies that the present method of construction and operation of said electrical wires is greatly and needlessly dangerous to life, or to the safety of the whole community, or of the plaintiff and its patrons, as set forth in said bill.

It denies that its present method has damaged, or has or will unlawfully, greatly and needlessly interfere with and damage the plaintiff's business. It denies that it follows from the present method of electrical propulsion that as each car moves past the neighborhood of telephones or the premises of said plaintiff's subscribers the effects set forth in said bill are produced. On the contrary, the defendant avers that, if such effects do result to the plaintiff, it is through the ignorance or carelessness of the plaintiff in not providing its own electrical equipment with contrivances easily available to it at little cost, which would completely obviate all of the annoyances and disturbances set forth at length in the bill.

It admits that it is a corporation duly organized and existing under the laws of the State of New York for the purpose of erecting electric street and other electric motor power and plants.

It denies that it has entered into any combination or contract with its said co-defendant to do any act to the wrong or injury of the plaintiff, or that it is now doing any such act or threatening to further extend or continue the same.

It denies that its business is experimental. On the contrary, it avers that it has built and is building between thirty and forty railways, of which about twenty have been in practical and successful operation for a considerable

length of time without interference with existing telephone wires situated as the same are in the city of Akron, not because said precautions and arrangements for a return metallic circuit, as insisted upon in said bill, were resorted to by it, but because the telephone companies in said other cities have completely protected themselves by thoroughly efficient and inexpensive equipment against the very interferences set forth in said bill.

It denies that plaintiff has complained to its representative of the things set forth in said bill, and requested the defendant to remedy the same in the manner described in the petition, and that it has refused to do so, pointing out to said plaintiff the impracticability of its suggestions, and at the same time informing it how all the things complained of might be obviated by it, as has been done by other telephone companies elsewhere.

It denies that the plaintiff's damages are continuous or that it is without adequate remedy at law; and it further denies that the said plaintiff by its pleadings, or by any proof which it can introduce, has made out or can make out any case for equitable cognizance.

We find that the operating of the defendant, the street railroad, by electricity does substantially interfere with the use of plaintiff's telephones as stated in its petition.

We further find that by the terms of the ordinance and contract of October 22, 1883, between the city of Akron and the plaintiff, which is in words and figures following, to wit:

"AN ORDINANCE GRANTING PERMISSION TO THE CENTRAL UNION TELEPHONE COMPANY, ITS SUCCESSORS AND ASSIGNS, TO ERECT AND MAINTAIN A SYSTEM OF TELEPHONES OR A TELEPHONIC EXCHANGE IN THE CITY OF AKRON.

Section 1. Be it ordained by the city council of the city of Akron, that the Central Union Telephone Company, its successors and assigns, be and they are hereby granted the right of way through, in and upon the streets, lanes, alleys, avenues and public grounds of the city of Akron, of the county of Summit and State of Ohio, for the use and purpose therein and thereon to erect, maintain and use all the necessary poles or posts of

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wood, iron or other suitable material and the necessary wires to operate and use successfully a system of telephones or telephonic exchange, in the city of Akron aforesaid, under the terms, conditions and restrictions following, that is to say :

1st. That the said Central Union Telephone Company, its successors and assigns, shall maintain the use (under proper and reasonable restrictions and rules) of an office and operate on lines of telephone wires at some convenient point within said city of Akron, and shall so set said poles or posts, and place the wires thereon in such places and in such manner as not to interfere with the travel on said streets, lanes, alleys, avenues and public grounds aforesaid, and shall put and keep in good order all those parts of the same interfered with or used in the erection of said poles or posts, and shall hereafter maintain the same in like good order.

2nd. Said poles shall never be set in the carriage way of any street, lane, alley or avenue, and shall be so set as not to interfere with the flow of water in any gutter or drain in said streets, lanes, alleys or avenues, and the points of location shall be determined under the direction of the street commissioner or the city civil engineer of said city, and the points or location shall be at the projection of the property lines so far as practicable, unless abutting property owners consent to other points of location.

3rd. In case that other poles or posts than those now in use upon the portions of streets now or hereafter occupied by business houses should hereafter be erected by said telephone company, its successors or assigns, they shall be of such length that the lowest wire thereon shall not be nearer to the ground than thirty feet, and all poles or posts shall be as near straight as can reasonably be obtained, and shall be kept painted upon such streets or portions thereof as the said city council may direct.

4th. When said company, its successors or assigns, shall elect, it is hereby authorized to place and support its wires upon the poles now or that may hereafter be erected by said city for its fire alarm telegraph, but its said wires so placed and supported shall be placed beneath the wires of said city upon cross-arms when more than one wire is used, but in no case lower than the ordinances of said city permit ; and when the distance between the poles of said city exceeds one hundred seventy-five feet, said company, its successors or assigns, shall erect intermediate poles, and when, by reason of so placing said wires, an undue strain is imposed upon the poles of said city, said company, its successors or assigns, shall erect additional poles or secure such poles with suitable stay wires.

5th. In the event of accident or damage to the wires, poles, insulators or cross-arms of the fire alarm telegraph, where the city poles are used as above mentioned, said company, its successors or assigns, shall, upon notification, forthwith furnish one or more competent men to assist the proper city authorities in repairing such damage ; and whenever it becomes necessary to replace any of the poles of said company, which are used by said city, as hereinafter mentioned, to support its fire alarm telegraph

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wire, said city shall, upon request, furnish one or more competent men to assist in replacing such poles.

Sec. 2. In consideration of the privileges hereby granted, said city council shall have the right to place and support the wires of its fire alarm telegraph above the wires and upon any poles of said company, its successors or assigns, and said company, its successors or assigns, shall, for the term of this ordinance, furnish and keep in repair, free from expense, for the use of said city, three complete sets of telephonic instruments—one set at the central engine house, one set at the city building, and one set at the office of the city solicitor, and keep the same in constant connection with the central exchange, with the right at all times to communicate thereby upon any of the local exchange wires of said company, its successors or assigns, and as the number of telephonic instruments of said company shall increase in said city, an additional set of telephonic instruments shall be furnished to said city, free of charge, for each one hundred of said instruments in use exceeding the number three hundred.

Sec. 3. Said city expressly preserves the right to grant privileges similar to those granted herein, at any time, to any other telephone company, but the same shall not interfere with the proper use of the rights herein granted, and any failure on the part of said Central Union Telephone Company, its successors or assigns, to comply with the terms and conditions of this ordinance, after reasonable notice so to do, shall, at the election of said city, work a forfeiture of the rights and privileges herein given and granted, and said city shall enact such ordinances as may become necessary, within its legislative power, for the protection of telephone poles, fixtures and wires against abuse and injury.

Sec. 4. This ordinance, upon said Central Union Telephone Company filing a written acceptance with the clerk of said city of the terms hereof, shall take effect and be in force for the term of five years from and after its passage and legal publication. Passed October 22, 1883."

All rights and privileges granted or intended to be granted by said city to plaintiff, and all acts to be done or performed by said plaintiff, by the terms of said ordinance and contract, determined and ceased on the 22nd day of October, 1888, with no intent or notice to any one that it expected to longer continue.

That on July 2, 1888, city council of the city of Akron passed an ordinance as follows, to wit:

"AN ORDINANCE GRANTING PERMISSION TO JOHN S. CASEMENT, HIS SUCCESSORS AND ASSIGNS, TO CONSTRUCT AND OPERATE A STREET RAILROAD IN AND ALONG CERTAIN STREETS THEREIN NAMED.

Section 1. Be it ordained by the city council of the city of Akron, that John S. Casement, his successors and assigns, be and they are hereby

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granted permission to construct and operate a street railroad, with either single or double tracks, with all necessary turntables, turnouts, sidings, switches, wires and poles in and along Market street, from the west corporation line to Factory street, in the sixth ward, and in and along College street from Market street to Middlebury street; in and along Middlebury street from College street to Spicer street; in and along Spicer street from Middlebury street to Exchange street; in and along Exchange street from Spicer street to Main street, and to reconstruct the street railroad now in Howard street from Beach street to Main street, and in Main street from Howard street to the south corporation line; with the necessary wires and poles to adapt said street railway to the use of electricity as a motive power for the period of twenty-five years from the passage of this ordinance, under and upon the terms and conditions following, to wit:

1st. That said John S. Casement, his successors and assigns, shall, in all instances, construct, operate and maintain and keep in order and repair its said street railroad, and the portions of the streets along which they shall construct or reconstruct any part of said street railroad, in full conformity to subdivision 11 of chapter 34 of the revised ordinances of the city of Akron, as amended May 28, 1888, as fully and fairly as if said subdivision and its amendments were fully embodied therein; that the rights and privileges reserved to said city, its inhabitants, other individuals and corporations in said chapter and its amendments, shall be in all instances and particulars recognized by said John S. Casement, his successors and assigns.

2nd. That if said John S. Casement, his successors and assigns, lay out a single track, the said track shall be laid along the center of the street; if a double track be laid each track shall be so laid as to have the same relative position to the center of the street and as near together as safety for the passage of cars will permit.

3rd. That said John S. Casement, his successors and assigns, shall not charge more than five cents for each passenger carried one way over said lines of railway from the point where the passenger boards the car to the point of destination, and where it is necessary to change cars before reaching said destination, suitable provision shall be made by transfer tickets or otherwise, for giving said authority to complete his journey without extra charge therefor.

4th. That the gauge of said track shall be four feet eight and one-half inches, or the usual width of carriages. That the cars upon said lines of railway shall be propelled by means of electricity.

Sec. 2. That said John S. Casement, his successors and assigns, shall hold said city harmless from any and all damages to the person and property of any individual or company occurring by reason of the use or occupancy of said streets during the construction or operation of said railroad lines.

Sec. 3. That said John S. Casement, his successors and assigns, shall have that portion of said lines in and along Howard and Main streets, in and along Market street from Portage road to Case avenue, in operation

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for the transportation of passengers within ninety days from and after the passage of this ordinance; and to have other portions of the said lines covered by said grant finished and in operation within two years after the passage of this ordinance.

Sec. 4. That the city of Akron shall not be held liable to any such individual or company for damages that may occur from the breakage of any sewer or water pipe, or from any delay that may be caused by the construction of sewers or the laying of water or gas pipes or the necessary repairing of either, or the improvements or repair of any street or highway, or for the moving of buildings over and along said track, or for any other delay or damage that may be caused by fire, water or otherwise.

Sec. 5. A failure of said John S. Casement, his successors and assigns, to comply with the terms and conditions of this ordinance after twenty-days' notice from the city council, shall operate as a forfeiture by said John S. Casement, his successors or assigns, of all the rights and franchises herein granted.

Sec. 6. That said John S. Casement, his successors and assigns, shall have all the rights and privileges allowed companies or individuals operating street railroads in said city, under the provisions of the ordinance and its amendments alluded to in section 1 of this ordinance, except as herein expressly limited and modified, but subject always to such further regulations as are reserved to be hereafter made by the terms of said ordinance and its amendments.

Sec. 7. This ordinance shall take effect upon its passage and acceptance in writing of the terms and conditions hereof by the said John S. Casement."

That immediately upon the passage of said ordinance the defendant, the street railroad company, commenced constructing their plant for generating electricity and also the same railroad to be operated by electricity, all of which was well known to the plaintiff upon the passage of the ordinance of September 3, 1888, which is as follows:

"AN ORDINANCE CONTINUING TO THE CENTRAL UNION TELEPHONE COMPANY THE RIGHT TO ERECT TELEPHONE POLES AND WIRES, AND GRANTING SAID RIGHT ON TERMS AND CONDITIONS HEREIN STATED.

Section 1. Be it ordained by the city council of the city of Akron, Ohio, that the right heretofore given by the city council to erect and maintain telephone poles and wires in said city is hereby continued; and the right is hereby granted to The Central Union Telephone Company, its successors and assigns, to erect and maintain on the streets, alleys and public ways of said city, poles, fixtures and wires necessary and convenient for the purpose of supplying to the citizens of said city and the public communication by telephone or other electrical devices, all such right and use to be and continue upon the terms and conditions herein stated.

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Sec. 2. The location of poles and lines now in use and any change therein, or extension thereof, shall be under the direction of the committee on fire and water of said city council.

Sec. 3. Said poles and wires shall be placed and maintained so as not to interfere with travel on said highways; and in no case shall any wires be less than twenty feet from the ground; and said company shall hold said city free and harmless from all damages arising from any abuse or negligence in said occupancy. Said poles shall be so placed as not to interfere with the flow of water in any sewer, gas pipe, drain or gutter, and in case of bringing to grade of any street or alley, said poles shall be by said company reset, so as to conform thereto. And this grant is made and is to be enjoyed subject to all such reasonable regulations and ordinances, of a police nature, as said city council may at any time adopt, not destructive of the rights herein granted.

Sec. 4. The right of use herein given shall not be exclusive, and the council reserves the power to grant like rights to other persons for like purposes.

Sec. 5. In consideration whereof said Central Union Telephone Company hereby agrees to allow said city to attach, at any time, to any of said poles, the city's fire alarm or police wires, and for such purpose said city shall have the right to use so much of the top cross-arm on said poles as may be necessary therefor, and in such case said company shall not place any wire on said cross-arm nearer than twenty inches to said city wires, and said city shall not be compelled to place wires so used nearer than twenty inches from each other; provided said attachments and said city use shall not interfere with said company's use of the rest of said poles, and all said attachments shall be made and maintained under the direction of said company's manager in said city.

The said company is to furnish for the city's business, with exchange service, without charge, so long as an exchange is maintained hereunder, and maintain and keep in good working order, five telephones, one each at the mayor's office, the city solicitor's office, the city civil engineer's office, the city clerk's office, and the central fire station; and to furnish instruments for one telephone at the residence of the chief of the fire department, one at the residence of the assistant chief of the fire department, one at the residence of the superintendent of fire alarms, and one at each fire station that is now or may hereafter be constructed, which last mentioned telephones shall be erected and maintained at the expense of said city and operated from a private switchboard at the central fire station, the same as is now done, and for that purpose said company shall erect and maintain two wires from their central exchange to said central fire station, and keep the same in constant connection therewith.

Sec. 6. This ordinance shall take effect and be in force for the term of five years from and after its passage and filing by said company of an unconditional acceptance of the terms thereof, in the office of the city clerk."

We find as a matter of law that when the plaintiff accepted, under the ordinance of September 3rd, that the street railroad company, defendant, was then in possession of said streets of Akron, under and by virtue of the ordinance of July 3d, and if the question involved was to be settled upon the ground of priority, then the railroad company was prior, and the plaintiff accepted, under the ordinance of September 3rd, with the conditions as they then existed.

But we are of opinion that the council had not the authority or power to grant any privileges or rights to either the plaintiff or defendant to the exclusion of the other, and that it did not attempt or intend by its said ordinance to do so; and if they attempted to do so the party claiming that it had been done would not be entitled to an order of this court restraining the railroad or telephone company from constructing, and maintaining in a proper and suitable manner, the necessary machinery for carrying on its business.

We are not satisfied from the proof in this case that a return trolley wire as suggested would relieve the difficulty, and should hesitate before ordering it to be done, lest it would be money uselessly expended, and from the proof in this case the system used on the railroad would not operate or run the cars, except that the electricity pass from the wheels into the earth as the same now does.

Neither are we absolutely certain that a return wire by the telephone company, forming a metallic circuit, would entirely relieve the telephones, and yet Mr. McCluer's affidavit (the facts therein having not been prepared for this case, but for the instruction of telephone electricians) is directly to the point that such wire will completely accomplish such result. If Mr. McCluer is correct as to this, under the proof we must find that such wire will relieve the telephones. In which case the telephone company can put in said wire, and the cost and expense of placing such wire would be the measure of their damages, and if under the

law the defendants are liable therefor, the same could be recovered in a suit at law.

The injunction prayed for is refused, and petition dismissed.

NOTE.—See note to next case.

THE EAST TENNESSEE TELEPHONE COMPANY v. THE
CHATTANOOGA ELECTRIC STREET RAILWAY COMPANY.

Chancery Court of Chattanooga, Tennessee, June 21, 1889.

(From private print.)

WIRES IN STREETS.—INTERFERENCE.—INJUNCTION.

In an action by a telephone company, based upon the threatened interference with the use of its lines by an electric street railway company, a motion to vacate a preliminary injunction was granted upon the condition that the defendant give bonds to the plaintiff to ensure the payment of any judgment which might be obtained by it; the decision being put upon the sole ground that it did not sufficiently appear to the court that the plaintiff would be injured by the operation of the defendant's system.

MOTION to dissolve preliminary injunction.

The threatened injury to the plaintiff's telephone system, as charged in the complaint, was that to be caused "by necessary and unavoidable induction from its overhead or trolley wire, and 'leakage' from the iron rails of its track and ground circuit." Further facts sufficiently appear in the opinion.

Creed F. Bates, for complainant.

Shepherd & Watkins, for defendant.

WILLIAM HENRY DEWITT, Special Chancellor: The

complainant, a Kentucky corporation, operates a telephone exchange in Chattanooga.

The right of way over and through the streets was granted to it by the city in 1880, and the company has been doing business under the grant ever since that time.

Respondent company organized under the general corporation laws of Tennessee, in October, 1888, as a street railway company, with power to operate its cars by *electricity*.

The city granted to it the right of way through its streets, and the company is ready to operate its cars by *electricity*. The complainant obtained an injunction upon the alleged ground that the operation of respondent's cars by the plan or system which it proposes to put forward will do irreparable mischief to its plant, business and franchises, and the way whereby it is insisted that this will be done is pointed out.

Complainant insists that the plan for the operation of respondent's cars, or one similar to it, has been tried in other cities, which resulted in great injury if not total destruction to the telephone exchange, and that the like result will occur here if it is permitted to proceed.

Complainant further insists that the respondent's plan is what is known as the "Sprague Overhead System." That it consists of a large copper wire suspended overhead along the center of the railroad track, supported in position by wires or arms attached to poles on the side of the street. That the electric current used to propel the cars is transmitted through this wire (called the "trolley wire"), and has a force of three hundred volts. That is to say, its proportion is one thousand times the force of the electric current which the complainant is obliged to use.

The complainant also insists that the affidavits of the most distinguished electricians in the United States have been filed by it, and that they show these important facts:

1. That the double trolley system is the most approved system.
2. That it prevents injury to telephones.

3. That the Sprague system uses the "double trolley" wires in other cities.

4. But that the double trolley wires are not to be used in Chattanooga. And further, while the double trolley will prevent injury, nothing else will.

To continue the injunction complainant has introduced affidavits of several distinguished electricians in support of its positions ; and it is insisted that the damage which would result to complainant is peculiar and irreparable, not at all susceptible of being estimated in damages, and therefore the injunction ought not to be dissolved.

Respondent, Electric Street Railway Company, answers and denies the material points above stated, and especially denies that if it is permitted to put its wires overhead and operate its system that it will injure or destroy the business of complainant in any manner whatever. Respondent alleges that its system is used in many places, and that no injury has been done to properly constructed telephone systems.

And further, that the wire upon which the electric current is to be transmitted has been properly insulated and protected by guard wires, so that it is impossible for the telephone wires to come into contact with the electric railway wires, &c. It is said for respondent, when we enter the city where we encounter the telephone wires we have adopted an additional precaution, *which has never been adopted heretofore or elsewhere*, viz., and then goes on to state in what this new discovery consists. It is not insisted that the plan of the respondent is the "double trolley" system or like it.

Respondent further insists that complainant's telephone plant will be but little interfered with, and none of its telephone lines are properly constructed.

Further, that the complainant, by the use of ordinary care, and the outlay of a small amount of money, can remedy the anticipated evils, and greatly improve upon its *poor* and *inefficient* service. In other words, it means, in substance, that if the complainant will add to its plan of

operating its telephones the methods suggested by respondent or the like, the injury contemplated by complainant could not occur.

Respondent also supports its positions by the affidavits of several learned electricians, and now moves to dissolve the injunction.

In view of the above statement of the case, what are the relative rights and duties of the parties upon the motion?

Two questions arise in this case:

1. In point of fact, will the injury apprehended be inflicted?

2. Is the injury one to which the law compels the complainants to submit, or is it one against which the law will give protection?

Telephone companies were recognized and provided for by the laws of Tennessee long before street railways were permitted to use electricity to operate their cars.

Telephone companies, under the acts of the Tennessee Legislature, have the power of eminent domain. Being public, their property cannot be taken for other public companies, unless such companies are organized under the laws which provide that it may be done.

We are aware of no provision of law in Tennessee permitting this to be done by a street railway company. It does not appear that any statute empowers a street railway company to condemn the property of other public companies, nor does the law confer upon such companies the power to condemn the property of private persons within the city limits.

The telephone company, having been in possession under its charter and the city ordinance years before the charter of respondent company was obtained and the right of way granted to it by the city, acquired a vested right to use the strip of earth along the lines of its poles through the streets.

The ordinance granting the right of way and easement of user constituted a contract which the city itself could not impair, unless this right was expressly reserved, and

especially is this so since the telephone company has accepted the grant and is operating under it. A franchise is the legal right to use corporate property in a prescribed way for profit. It is property in a sense, and cannot be destroyed without making compensation. The law is the same with respect to easements. The telephone company's franchise, or right to use its corporate property for the uses of its chartered business as known and recognized at the time of the grant to it, was and is a vested right, entitled to be protected as "property" under the law.

Respondent company, not having the right to exercise the power of eminent domain in this case, of course cannot proceed to condemn and pay for complainant's property for the use of the respondent company.

If respondent company's plan or system of operating its street cars by electricity should result in the partial or entire destruction of complainant's property, it would be liable for damages.

The acts of the Tennessee Legislature authorizing electricity to be used by street railways does not prescribe the mode of utilization.

In such cases (where the mode of the use is not prescribed) the law is, that a company invested with franchises, the operation of which is affected with a public use, must, in the construction and operation of its work, use the best and most approved devices that skill and science have devised to prevent injury from the exercise of the powers given by the grant, either to public or individual rights. This is the rule to prevent injury in all such cases. Of course, unless injury results to others, the rule does not apply.

Far back in the ages when society was formed and laws were provided for the protection of private rights, &c., the distinction was marked between man's absolute rights and the relative rights he owed to his fellow man. Then the foundation was laid from which arose the common law maxim, "*Sic utere tuo ut alienum non laedas*," which is the rule with respect to natural persons, and it ought

rigidly to be the rule with respect to corporate or artificial persons. Therefore, "so use your own property that you harm not another's."

This common law rule not only applies to natural persons, but also to corporations using dangerous agencies as well. One corporation is as much legally bound to respect this rule toward another corporation as if both were natural persons. It is in a sense the means employed and the mode of the use that marks the true line.

The common law has been aptly called the "*lex non scripta*," because it is a rule prescribed by the common consent of the community as one applicable to its different relations, and capable of preserving the peace, good order and harmony of society, and rendering unto every one that which of right belongs to him. Though principles once established by judicial decision can only be changed by legislative enactment, yet, such is the malleability of the common law that new principles may be developed and old ones extended by analogy so as to embrace newly created relations and changes produced by time and circumstances. Such it was when we adopted it, and such it now is with us.

Generally in the law, as well as in all other human literature, antiquity is the foundation. He who knows the order can distinguish what is new. He who deals only in the new cannot tell how fresh or stale his opinions are nor whence they are derived.

If the complainant's system of operation is defective it will not affect the respondent's liability. The electrical current used in telephony is too feeble and delicate to do injury to others. The inferiority of complainant's works is immaterial in this controversy. If it were a question between the telephone company and its patrons, or between it and some one who claimed to have been injured, the condition of the complainant's works would be material. But the question here is whether the telephone company has been injured or will be injured by respondent company. The question here is, not as to the completeness of the tele-

phone company's plant, but as to the railway's relative rights and duties.

The controlling principle of law on the motion before us is, if complainant company apprehends injury and can satisfy the court that injury will come if respondent's cars are operated under its plan or system, complainant company has a right to continue the injunction.

Affidavits will not be received to continue an injunction unless irreparable injury may ensue from a dissolution.

The general rule is not to receive affidavits to continue an injunction, except where the injunction is the remedial and only efficient part of the bill from the very nature of the subject matter in dispute, and where the parties cannot be put in *statu quo* if the injunction is dissolved.

A learned judge once said: "If affidavits can be received to keep up an injunction, they should be received in opposition;" and this rule has sometimes been practiced before able judges. It appears, however, somewhat like a trial on the merits at chambers. To be sure, the affiants are not cross-examined by either side. I have, however, considered the affidavits filed by both the complainant and respondent. The dissolution of an injunction is a matter within the sound discretion of the court, even when the allegations of the bill are fully met and denied. Courts of equity have constantly declined to lay down any rule which shall limit their power and discretion as to the particular cases in which injunctions shall be granted or withheld or dissolved. There is wisdom in this course, for it is impossible to foresee all the exigencies of society which may require their aid to protect rights or redress wrongs. A great name in the law contends that this jurisdiction should be fostered and upheld by a steady confidence. The discretion of a judge, it is true, is said to be the law of a tyrant, it is always unknown. It is different in different men. It is casual and depends upon constitution, temper, taste and passion. In reference to the discretion as to granting and dissolving injunctions, Mr. Justice BALDWIN said: "There is no power, the exercise of which is more

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for the transportation of passengers within ninety days from and after the passage of this ordinance ; and to have other portions of the said lines covered by said grant finished and in operation within two years after the passage of this ordinance.

Sec. 4. That the city of Akron shall not be held liable to any such individual or company for damages that may occur from the breakage of any sewer or water pipe, or from any delay that may be caused by the construction of sewers or the laying of water or gas pipes or the necessary repairing of either, or the improvements or repair of any street or highway, or for the moving of buildings over and along said track, or for any other delay or damage that may be caused by fire, water or otherwise.

Sec. 5. A failure of said John S. Casement, his successors and assigns, to comply with the terms and conditions of this ordinance after twenty-days' notice from the city council, shall operate as a forfeiture by said John S. Casement, his successors or assigns, of all the rights and franchises herein granted.

Sec. 6. That said John S. Casement, his successors and assigns, shall have all the rights and privileges allowed companies or individuals operating street railroads in said city, under the provisions of the ordinance and its amendments alluded to in section 1 of this ordinance, except as herein expressly limited and modified, but subject always to such further regulations as are reserved to be hereafter made by the terms of said ordinance and its amendments.

Sec. 7. This ordinance shall take effect upon its passage and acceptance in writing of the terms and conditions hereof by the said John S. Casement."

That immediately upon the passage of said ordinance the defendant, the street railroad company, commenced constructing their plant for generating electricity and also the same railroad to be operated by electricity, all of which was well known to the plaintiff upon the passage of the ordinance of September 3, 1888, which is as follows :

" AN ORDINANCE CONTINUING TO THE CENTRAL UNION TELEPHONE COMPANY THE RIGHT TO ERECT TELEPHONE POLES AND WIRES, AND GRANTING SAID RIGHT ON TERMS AND CONDITIONS HEREIN STATED.

Section 1. Be it ordained by the city council of the city of Akron, Ohio, that the right heretofore given by the city council to erect and maintain telephone poles and wires in said city is hereby continued ; and the right is hereby granted to The Central Union Telephone Company, its successors and assigns, to erect and maintain on the streets, alleys and public ways of said city, poles, fixtures and wires necessary and convenient for the purpose of supplying to the citizens of said city and the public communication by telephone or other electrical devices, all such right and use to be and continue upon the terms and conditions herein stated.

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Sec. 2. The location of poles and lines now in use and any change therein, or extension thereof, shall be under the direction of the committee on fire and water of said city council.

Sec. 3. Said poles and wires shall be placed and maintained so as not to interfere with travel on said highways; and in no case shall any wires be less than twenty feet from the ground; and said company shall hold said city free and harmless from all damages arising from any abuse or negligence in said occupancy. Said poles shall be so placed as not to interfere with the flow of water in any sewer, gas pipe, drain or gutter, and in case of bringing to grade of any street or alley, said poles shall be by said company reset, so as to conform thereto. And this grant is made and is to be enjoyed subject to all such reasonable regulations and ordinances, of a police nature, as said city council may at any time adopt, not destructive of the rights herein granted.

Sec. 4. The right of use herein given shall not be exclusive, and the council reserves the power to grant like rights to other persons for like purposes.

Sec. 5. In consideration whereof said Central Union Telephone Company hereby agrees to allow said city to attach, at any time, to any of said poles, the city's fire alarm or police wires, and for such purpose said city shall have the right to use so much of the top cross-arm on said poles as may be necessary therefor, and in such case said company shall not place any wire on said cross-arm nearer than twenty inches to said city wires, and said city shall not be compelled to place wires so used nearer than twenty inches from each other; provided said attachments and said city use shall not interfere with said company's use of the rest of said poles, and all said attachments shall be made and maintained under the direction of said company's manager in said city.

The said company is to furnish for the city's business, with exchange service, without charge, so long as an exchange is maintained hereunder, and maintain and keep in good working order, five telephones, one each at the mayor's office, the city solicitor's office, the city civil engineer's office, the city clerk's office, and the central fire station; and to furnish instruments for one telephone at the residence of the chief of the fire department, one at the residence of the assistant chief of the fire department, one at the residence of the superintendent of fire alarms, and one at each fire station that is now or may hereafter be constructed, which last mentioned telephones shall be erected and maintained at the expense of said city and operated from a private switchboard at the central fire station, the same as is now done, and for that purpose said company shall erect and maintain two wires from their central exchange to said central fire station, and keep the same in constant connection therewith.

Sec. 6. This ordinance shall take effect and be in force for the term of five years from and after its passage and filing by said company of an unconditional acceptance of the terms thereof, in the office of the city clerk."

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and the sheriff's sale under a decree of foreclosure was made June 2, 1885, and, after time of redemption had expired, a deed was executed and delivered. On April 1, A. D. 1885, defendant became the assignee in insolvency of the mortgagee.

The question in this case is whether the property in question passed by the mortgage, or remained in the mortgagor, and passed by the assignment, under the insolvency proceedings, to defendant, Drake. The record shows that an electric light company had been organized, and was engaged in lighting the city of Tucson by that means ; that in 1883 the company purchased lot 2, in Tucson, of one Wilkins, for the purpose of placing and constructing an electric plant thereon so as to light said city thereby ; that after the purchase of said lot, such plant was constructed, including boilers, engines, dynamo, and as a necessary, integral, and ordinary part of such plant, there were erected in the streets of the city 18 masts, and wires were strung thereon, along which the electric light current ran so as to conduct the same to the electric lamps located in the different parts of the city, and so light the same. The said wires so strung were attached to the building on said lot, and to the dynamo therein, and thereby the current was completed. To cut the wires, or by any means destroy such connection, rendered the whole plant useless for that purpose. The mortgagee conveyed said lot, "together with all machinery, including the boiler, engine and dynamo, now situated on the said land, and together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining." The only question here is whether, by this mortgage, there passed to the mortgagee the wires so strung along said masts. Defendant insists that the same did not pass, and that he may cut such wires, and treat the same as the personal property of the mortgagor. Plaintiff insists that the whole plant, including the wires so strung, passed by the mortgage.

This raises a very important question. It is urged that

the said wires are a fixture to the lot, and as such pass by the mortgage. There is great confusion in the books in the definition of the term "fixtures." It is held to denote "such articles of a chattel nature as, when once annexed to the realty, may not be removed by the party annexing them, as against the owner." Ewell, Fixt. 1, and cases cited. On the other hand, just the reverse is held to be the true definition; that is, chattels annexed that may be removed, etc. Ferard, Fixt. 2, and cases cited. It is difficult to determine in which of the above senses it is most frequently employed.

"A fixture is an article which was a chattel, but which, by being physically annexed or affixed to the realty, became accessory to it, and a part and parcel of it." This definition is sustained by all the authorities. Amos & F. Fixt. 11. "Things fixed in a greater or less degree to the realty." 2 Kent Comm. 345, note *a*. "Anything annexed to the freehold." 2 Smith, Lead. Cas. 239, note. In *Teaff v. Hewitt*, 1 Ohio St. 511, the court discuss this whole question: "The term 'fixture,' in the ordinary signification, is expressive of the act of annexation, and denotes the change which has occurred in the nature and legal incidents of the property; and it appears to be not only appropriate, but necessary, to distinguish this class of property from movable property possessing the nature and incidents of chattels."

The fact that there are exceptions to the rule in favor of tenants as against landlords, and in favor of trade, does not change the definition. *Quicquid plantatur solo, solo cedit*, was the maxim of the common law; and, as between vendor and vendee, and mortgagor and mortgagee, remains to-day unchanged. Co. Litt. 53; 2 Smith Lead. Cas. 114; 2 Kent Comm., note *a*, 345; *Elwes v. Maw*, 3 East, 57. Whichever definition may be regarded best, all concur that, where the chattel is "fixed" or "annexed" physically to the soil, it becomes a part of the realty.

The electric light current was affixed to the soil as firmly as the nature thereof would permit. It was attached

physically to it, and became a part of the fixed machinery. To that extent this electric light current is a fixture. But it is contended, that while this is so, yet that a fixture must be on the land, and that that may not be a fixture which is off the land.

A case is cited holding that where an engine was on one lot, and connected with a machine on another lot, that the machine on each lot is a fixture on the lot on which it is constructed. *McDonald v. Minneapolis Lumber Co.*, 9 N. W. Rep. 765. That is not this case. Here one lot is devoted to the maintenance of an electric light plant. Upon it are erected buildings, and in them are placed motive power and dynamo by which an electric current is to be created, and from the same led by means of wires annexed thereto and running out of the building, strung on poles set up in the streets of the city, through the city to points where this light is needed, and returning by the same means, are so connected with the dynamo as to complete the circuit, and so make effectual the operation of a machine of which it is an integral and necessary part. It has a "right of way" along the streets of the city, which is no more than a mere license, and the license is subject to the public use of the streets, and in no way affects the fee to the same. Such use of the streets is a public use, and the power to grant such use is to be found in the same powers that grant the use of streets to railway companies, gas companies, water companies and the like. The mortgage or sale of a railway would carry its tracks laid in or across a highway annexed to its tracks, on its exclusive right of way, or even its locomotives and cars thereon. Rolling stock of a railway is a part of the realty where a railroad is mortgaged, though used on lines not included in the mortgage. *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, and see note to this case.

The later, and we think the better, doctrine does not require an actual fastening to the soil as essential to making a chattel a fixture. The third rule stated by Mr. Carpenter (2 Wall. 646) is sustained by these authorities:

“If the thing be essential to the use of the real estate, and has uniformly been used with it, then it passes, though not fastened to it.” *Farrar v. Stackpole*, 6 Greenl. 157; *Snedeker v. Warring*, 12 N. Y. 170; *Pierce v. Emery*, 32 N. H. 484; *Minnesota Co. v. St. Paul Co.*, *supra*; *Railroad Co. v. Thompson*, 103 Ill. 209.

The electric current, including wires, poles, insulators, and appliances, was an essential part of the machine. To sever it was to destroy it. The object of the law is to preserve, and not to destroy. A machine made of many parts, operated for a useful purpose, may have great value. Sever the parts, and they are each comparatively worthless. And it is the duty of the courts, so far as may be, to so construe the law that the usefulness and value of such property may be maintained. In *Regina v. North Staffordshire Ry. Co.*, 3 El. & El. 392, Lord COCKBURN held that telegraph apparatus, consisting of posts driven into the ground, and wires passing through sockets annexed to the posts, but which wires might be disconnected from the posts without injury or displacing them, were a part of the appliances of the defendant railway company, and were fixtures, as they were so attached that it was intended that they should remain permanently connected with the railway, or the premises used with it, and remain permanent appendages to it as essential to its operation. Such is this case.

We have so far considered this as though it were an ordinary conveyance of the lot, but the mortgage conveyed the lot, “together with all the machinery, including the boiler, engine and dynamo now situated on said lot, and together with all and singular the tenements, hereditaments and appurtenances thereto belonging, or in anywise appertaining.”

In *Pickerell v. Carson*, 8 Iowa, 544, a sale of “the fixtures and appurtenances contained in the daguerreian rooms,” etc., embraced all such property as was used in carrying on the business, such as maps, pictures, stoves, carpet, apparatus and furniture, machines and stock, as appurtenances, and skylight, balcony, partition, etc., as fixtures.

Fechet v. Drake.

The electric current is, then, an appurtenance to the machinery situated on that lot, and is therefore covered by the language of the mortgage, even if not a fixture. Extra rolls in a rolling-mill, removable at pleasure, were held to be a part of the realty as appurtenant to it. *Pyle v. Pennock*, 2 Watts & S. 390. A statue and a sun-dial also *Snedeker v. Warring*, 12 N. Y. 170; *Wadleigh v. Janvri*, 41 N. H. 503. A mortgage of a railway, with its appurtenances and franchises, includes its rolling stock, too, and all movable property used in its operation. *Railroad Co. v. Thompson*, *supra*.

The ingenuity of invention, creating new appliances, usefulness, constantly brings new facts for the consideration of the courts; and to these, established principles must be applied. To determine whether a particular chattel has become a "fixture" or an "appurtenance" must be guided by authority. A consideration of authorities leads to the conclusion that in each case it is a mixed question of law and fact, largely to be determined by the intention of the parties, and the uses to which the chattel is devoted. In this case it was the evident intention of the parties to make this electric current a part of the machine mortgaged and attached to the land—to be a part of the realty. We hold, therefore, that the current so attached passed with the mortgage.

The judgment is affirmed.

NOTE.—See INDEX to vol. 1, title "Poles and Wires as Property." In *American Union Telegraph Co. v. Middleton*, 80 N. Y. 100, it was held that telegraph poles, with the wires and attachments, were affixed to the soil of a highway and constituted a part of the realty. The question arose over the legality of an order of arrest obtained in New York for the cutting down of poles in New Jersey. The court held that the poles being attached to the realty, the cutting of them was a trespass, for which damages could be recovered only in an action *clausum fregit*, which must be brought in New Jersey.

JOHN B. YATES V. SOUTHWESTERN BRUSH ELECTRIC LIGHT
AND POWER COMPANY.

Louisiana Supreme Court, May, 1888.

(40 La. An. 467.)

EXPLOSION OF ELECTRICAL APPARATUS.

(Head note by the court):

This is an action for damages occasioned to a policeman, while on duty at the New Orleans National Bank, by an explosion of a part of the apparatus pertaining to its electrical installation. It comes fairly within the principle of the Code that is to the effect that every one is "responsible, not only for the damage occasioned by his own act, but for that which is caused by the things which he had in his custody or control."

APPEAL from the Civil District Court of the Parish of Orleans; TISSOT, J. Action for damages. Facts stated in opinion.

Braughn, Buck Dinkelspeil & Hart, for plaintiff and appellee.

E. M. Hudson, for defendant and appellant.

The opinion of the court was delivered by WATKINS, J.:

The plaintiff seeks to recover \$3,000 damages from the defendant company on account of certain injuries he received while in the performance of duty in the building and property of the New Orleans National Bank, situated corner of Camp and Common streets, in the city of New Orleans—he being a member of Boylan & Farrell's police force at the time. The averments of his petition are, that the accident of which he complains took place on the morning of the 26th of February, 1887, at the hour of 6 o'clock A. M., and that it was occasioned by the explosion of a metal pipe, through which an electric wire passed, con-

veying electricity into the building, for the purposes of incandescent lighting; and, by the force of the explosion, fragments of the pipe were driven violently against his head, just behind the right ear, whereby he was felled to the floor, stunned and senseless for a time, and from which he received serious and permanent injury. The defendant's answer was a general denial. The case was tried by a jury, who found for the plaintiff \$2,500, and the defendant has appealed.

I. From the record we have gleaned the following facts in regard to the manner in which the accident occurred, the causes which superinduced it, and the injuries the plaintiff sustained by it. It appears that on the morning in question the plaintiff went on duty at the bank at 5 A. M., and, about an hour afterwards, his attention was arrested by an electric illumination which appeared over the door which opens into the president's room, and which is situated on the Camp street side of the building, facing Common street. He was standing about midway of the floor, and between this room and the desk of the paying teller. A moment afterwards, a blaze was discovered in the wood-work over the desk of the paying teller, which he hastened to extinguish, and while he was thus engaged the brass pipe, through which the electric wire connected with the electro, exploded, and a blow was inflicted on his head, and one on his back, which was turned towards the desk. The shock was attended with a sound like that of the firing of a pistol, and the illumination it produced had the appearance of rockets or fire-works; and it continued, at intervals, for fifteen or twenty seconds. The chandelier in the paying teller's apartment, into which the electric wire was introduced, was, at the time of the explosion, about twelve inches from his head. This wire was insulated, and passed through a metal pipe, and it was exploded, and the pipe also, by means of an unusual exertion of electric force. This was occasioned by a connection that was formed outside of the bank, on some part of the pole-line, with a wire carrying a higher tension of elec-

tricity than that which fed the incandescent lamps within the bank — that is to say, there was a contact, on the outside of the bank, of the wire which supplied the incandescent light inside, with a wire carrying an arc current of high tension, outside. The effect of this contact was to pass the arc current into the bank, and this current being beyond its capacity, an electrical explosion was produced, and the heat fused the metal and burst the pipe. In every electrical installation there is necessarily a safety fuse or safety catch, which is a mechanical contrivance that interpolates into the line of electric conductors a small piece of lead wire, the effect of which is that, when an abnormal amount of electricity flows over the wire of the circuit, it becomes melted, by the excessive heat engendered, and the current is broken. These devices are intended to secure additional safety to persons using incandescent light. The one over the desk of the paying teller had, in this instance, lost its cover, and its internal part was charred and defaced. The metal was melted and the wood-work burned. It had operated, but not in the right way. There were evidences of burning in the electro as well as the fuse-catch. There is no reasonable doubt of the fact that the proximate cause of the accident was the insufficiency of fuse-catches, either in number or capacity, to break the circuit, and cut off the flow of electricity from an arc wire on the outside of the bank. The brass tube containing the insulated wire was about 1-20 of an inch in thickness, and 1-4 of an inch in diameter, and the fragments of it which inflicted the wound on the plaintiff's head were about 2 1-2 inches in length. Their edges were jagged and rough, and the metal was tarnished and discolored. The tension of an arc current of electricity passing through a tube of such dimensions was quite sufficient to have exploded it, and send the fragments against the plaintiff's head with sufficient violence to have produced the injuries he received. The immediate effect of an arc current of the voltage this one appeared to have, when exercised upon an individual, would be that of a heavy blow, and might cause, at least,

temporary insensibility. From the blow inflicted there was a knot raised on plaintiff's head, which is described by one witness as being of the size of a hen's egg. He was stunned and felled to the floor, and rendered insensible for a time. He became quite sick from the effects of it, and vomited considerably. He became, on that account, unfitted for duty, his hearing in his right ear being seriously impaired. Since the happening of the accident, attacks similar to those described have occurred frequently, though at irregular intervals, and last three or four hours at a time; and the plaintiff states that he experiences from them a great pressure on the right side of the head, above and behind his right ear, coupled with an intense pain and dizziness. One of his medical attendants states that, upon making an examination of the plaintiff's ear, he discovered *tinnitus* — i. e., a buzzing or humming in the ear, and the ear-drum congested, which was likely to produce inflammation of the ear-drum, and impair the hearing. Having heard the plaintiff's testimony, he gave it as his professional opinion that, while the plaintiff may be comparatively free from trouble at times, his affliction will continue during life time. Since the accident the plaintiff has lost considerably in flesh, and has not been able to perform much work; and, indeed, it was stated by his counsel, in argument, and not disavowed by counsel of the defendant company, that on account of his being unable to perform satisfactory service he had been discharged from employment at the bank. At the date of this occurrence, he was about fifty-two years of age, but strong, athletic, and in perfect health. He is, and has always been, a laboring man. He has resided in the city ever since 1873, and has been regarded as faithful and efficient in the performance of any service assigned to him. He has a family dependent on him for support. At the time of the occurrence he was employed at a stated salary of \$45 per month — i. e., \$540 *per annum*. Manifestly this accident and consequent injury to the plaintiff was caused by the failure of the party establishing the electric installa-

tion in the bank to provide a means so essential to the safety of those using electric lights as the proper fuse-catches.

The happening of such an accident as the one under consideration may frequently occur in a large city like New Orleans, lighted externally and internally with electricity, which is generated by machines of different size, and the currents of which differ greatly in tension. Indeed, the difference in the polarity of the metals brought in contact would naturally produce combustion and explosion, at the risk of the population and hazard of property. To pass these differing currents of electricity from the generating machines to the various customers on its circuit, and to the lamps on the streets, a number of wires are employed, and they are strung on posts ; and it is the plain duty of the persons exercising so dangerous a franchise to have special care in their adjustment and installation, that their patrons their servants and agents be protected from loss and danger. Such care was not taken in this instance. The proof shows that there was provided in the electric installation of the bank what was termed a switch, the purpose of which is to enable a customer who is desirous of discontinuing the current at any time, to cut it off. But it appears that this switch was placed on the wall at the head of the staircase leading to the second floor ; that in order to reach it one had to pass out of the bank into Common street, thence to the rear of the building, and thence up the stairs. There was no other way of reaching it. In addition, the proof shows that neither the plaintiff, the janitor, or officers of the bank had been advised of its *existence*, much less of its use or locality.

II. Under the general issue the defendant sought to prove that the defendant company did not establish the electric installation in the New Orleans National Bank, and was not responsible on that account ; and that if any one was responsible it was the Storage Battery Company, by whom the installation was erected in the bank. On this issue the testimony took a very wide range, and is, unfortunately, in conflict in many particulars. We can only cite a few of

the leading features as illustrating the view it has given us. At the solicitation of certain persons, an officer of the defendant or Brush company visited Rotterdam, Holland, in the summer of 1886, and purchased the right to sell and operate the De Khotinski patent for storing electricity of high tension, designed for distribution in low tension currents, for purposes of incandescent illumination. In October of that year the Storage Battery Company was organized by the selection of a board of directors, a secretary, treasurer, superintendent and president, all of whom, except the last, being like officers in the Brush company. The patentee furnished the accumulators for use as reservoirs in storing electricity. The original contracts and the company's charter are of this general tenor as to the object of their organization. The officers of the Orleans National Bank claim to have made the contract for electric lighting with the Brush Company, and state that after the accident, they gave notice to that company that they at once had it inspected and repaired without protest or objection. The bills for the installation, as for lighting the bank during January and February, 1887, were made out on the blanks of the Brush Company and were presented for payment by their collector. The installation was directed by their superintendent. During these months the Brush Company operated incandescent lights from its own generating machine. The Storage Battery Company kept neither ledger, journals or statement, and no certificates of stock were ever issued. Its books were kept in the books of the Brush Company. It has no receipt showing payment to it of any bill for incandescent lighting. Its minutes show that during its potential existence, no contract was consummated with any company for incandescent lighting, and it had no lights of its own. The notes for the rent of No. 18 Front Street, where the accumulators were stored, were executed to the Brush Company. The cash-book of the Storage Battery Company shows that its *total revenue up to the date of 1887, the date of its suspension, was \$400.90*

that the total amount expended for material, antecedent to the accident, was \$450.65. That nothing was expended for lamps or electricity, or the power to generate it. There are sundry invoices in the name of the Storage Battery Company for goods purchased of the Westinghouse Electric Light Company, in March and April, 1887, aggregating \$10,000 in amount, while the cash book shows disbursements on that account of \$398 only. The minute book of that company shows that the president was only authorized, on the 24th of February, 1887, to contract with the Westinghouse Company for the purpose of supplying it with their system of incandescent lighting, and that on the 7th of May following, it had not been consummated. But, on the contrary, it appears that the Brush Company was operating the Westinghouse system *in April and May, 1887*, and they did not purchase from the Storage Battery Company. These and various other *indicia* satisfy us that the Storage Battery Company was merely an auxiliary of the defendant; that it never owned or used any system of incandescent electric illumination, and that its only object was to furnish storage for electricity of high tension, for distribution in low tension currents, for the greater convenience of the Brush Company. On this theory the manifold incongruities in the evidence can be harmonized and reconciled. The contention of the defendant, in this regard, cannot be sustained. The liability of the defendant is clearly made out.

III. This action is brought under those provisions of the Code which declare that "every act whatever of man that causes damage to another, obliges him through whose *fault* it happened to repair it" (R. C. C. 2315); and "every person is responsible for the damage he occasions, not merely by his *act*, but by his negligence, imprudence, or *want* of *skill*" (R. C. C. 2316); and "we are responsible, not only for the damage occasioned by our *own* act, but for that which is caused by * * * the *things* which we have in our custody" (R. C. C. 2317.) These articles need no elaboration. The text is concise and of easy appreciation.

Clarain v. Telegraph Co.

The instant case comes fairly within the principle of *Barnes v. Buren*, 38 Ann. 320, and *Howe v. New Orleans*, 12 Ann. 481, in each of which a person passing a street of this city was awarded damages for injuries inflicted by a falling wall. The plaintiff is evidently entitled to remuneration at the hands of the defendant; but we think that the amount allowed is excessive, and should be reduced to \$1,250.

It is, therefore, ordered, adjudged and decreed, that the verdict of the jury and the judgment of the court *a quo* be amended and reduced to \$1,250, and that, as thus amended, same be affirmed, with cost of appeal taxed against the plaintiff and appellee.

MRS. L. E. CLARAIN, individually and as tutrix, v. WESTERN UNION TELEGRAPH COMPANY.

Louisiana Supreme Court, Feb. 13, 1888.

(40 La. An., 178.)

INJURY TO LINEMAN.

A lineman having received injuries, which caused his death, by the breaking of wire causing his fall from a pole to the ground, *held*, that under the circumstances the telegraph company was negligent in not furnishing safe appliances, and that the lineman was not negligent.

ACTION by widow of employee of telegraph company, in behalf of herself and infant children, for damages sustained as stated in head note. The plaintiff was awarded \$3,000. Appeal by defendant.

W. S. Benedict and *W. E. Murphy*, for plaintiff and appellee.

Bayne, Denegre & Bayne, for defendant and appellant.

The opinion of the court was delivered by TODD. J.:

Louis E. Clarain, in the employ of the defendant company, while engaged in putting up telegraph wires on Carondelet street, in this city, fell from a telegraph pole and was killed.

This suit is brought by the widow of the deceased, in her own right, and as natural tutrix of her minor children, issue of her marriage with deceased, to recover damages on account of his death — damages resulting from the sufferings of the deceased, and damages caused directly to the widow and children by the loss of the husband and father.

The cause and manner of the death is set forth substantially as follows:

That Clarain was employed by the company as a lineman, in putting up and tying wires on their telegraph poles. That whilst he was so engaged some forty feet from the ground, and on a telegraph pole, it became necessary to stretch a wire on the outer end of a cross-arm of the pole, there being five wires already strung on the pole — three on the inner and two on the outer side. That in order to perform his work, it was necessary for him, by the aid of a steel spur or iron point, attached to one of his legs, to force the same into the telegraph pole as a support for his body, throw his other leg, free of any iron support, around the pole, and lean outward in a diagonal position from the pole to the outer wire of the arm attached to the pole, and there secure the telegraph wire, with iron nippers or pinchers, by a wire around the glass cup placed over the pin inserted in the cross-arm. While in this position, the wire being hauled taut many hundred feet ahead of him by means of a reel and apparatus provided for that purpose by the company, the wire broke near the cross-arm at which he was; the cross-arm itself broke where it was fastened to a telegraph pole, and, by reason of his then necessary position, he could not recover his center of gravity when the break took place, and was precipitated headlong to the stones beneath him. He was picked up, and, after suffering intense agonies, died within a week, leaving a widow and

three minor children, as his heirs, deprived of his comfort, his support, his life.

It is specially charged that the wire furnished for the work which he was performing was second-hand wire, full of kinks, that is, where it had been twisted it had lost its strength; and that the cross-arm of the telegraph pole was of light material, too thin, improperly bored, and of such brittle nature as to be entirely unfit for the purpose for which it was used. That Clarain has been for six years engaged in this business, both upon telegraph and telephone poles. That he was about thirty years of age, strong, active, and giving a regular support to his family.

The defendant excepted to the petition as follows:

1. That there was an improper joinder of parties upon distinct causes of action, and that the widow and children of the deceased could not, in the same suit, claim the damages which each have separately and distinctly sustained.

2. That the petition, not specifying the quantum of damages suffered by the widow and the quantum of damages suffered by the children, and not giving any details or specifications of these damages, was too vague and indefinite to admit of proper answer and defense.

3. That in so far as the widow claimed that the cause of action of the deceased survived in her, her petition disclosed no cause of action.

The first and third grounds of exception were overruled, and the second ground was maintained, with leave to amend.

Thereupon plaintiffs filed an amended petition, which, "reiterating the allegations of the original petition, averred:

"1st. That the damages sustained by the deceased, as hereinafter averred, survived in her minor children, of whom petitioner is natural tutrix.

"2nd. That she individually had sustained \$5,000 damages.

"3rd. That her children had sustained \$5,000 damages."

Defendant excepted that the supplemental petition, in so far as it alleged that the cause of action of the deceased sur-

vived in her minor children, was inconsistent with the original petition, and changed its substance.

This exception was overruled and the amendment allowed.

We think the ruling of the judge *a quo* on these exceptions was proper, considering that all the damages claimed resulted from one cause, and all parties in interest were before the court, and that the widow was suing both in her individual and representative capacities ; and since a judgment final and conclusive as to all the parties could be rendered in the suit pending, it was better to end the controversy in one suit than to remit the plaintiff to two different actions.

The disposition made of the matter affords no just ground of complaint, and is sanctioned by several adjudications. *Riggs v. Bell*, 39 Ann., and authorities therein cited.

The answer was a general denial and an averment of contributory negligence on the part of the deceased.

The case was tried by the judge, and, from a judgment in favor of the plaintiffs for \$3,000, the defendant has appealed.

There were many witnesses examined on the trial, and there is much conflicting testimony. We have thoroughly examined and considered it, and shall content ourselves with stating our conclusions respecting it as it bears on the issues presented.

1. We are fully satisfied that there was no contributory negligence on the part of the deceased. There was no opportunity afforded him to test the strength and soundness of the wire and cross-arms furnished him, and which were required for the performance of the services for which he was engaged ; and it is quite certain that had he insisted on making a sufficient test of them, and demanded that the requisite time be allowed him for that purpose, he would never have been employed. If there were defects in these materials, it would have been impossible for him to have discovered them in the time that was afforded him. In fact, they were not discoverable on a slight inspection. There is no evidence of any want of care in the handling or manipulation of the materials in his work.

2. That both the wire and cross-arm broke in the manner described in the petition, there is no dispute, and that the death resulted from this breakage is equally admitted.

As stated, the testimony of many witnesses was taken to prove that those materials were perfectly sound, and *per contra*, a number introduced to prove their unsoundness.

But, in our view of the matter, the fact that they did break is a demonstration in itself that they were not sound, or at least of sufficient strength to answer the purpose for which they were used. For the evidence does not show satisfactorily that they were subjected to an extraordinary or unusual strain when the casualty occurred.

There was then no fault on the part of the employee.

It must be considered that the employment was a dangerous one; not dangerous in merely climbing or ascending the poles, and reaching out to the end of the cross-arms and fastening the wires, but dangerous from the fact that the wire and its wooden support might chance to be defective or unsound. These, necessary for his work, the employee had a right to presume were entirely safe; and he was entitled to rest on this presumption for his security. *Hanson, tutor, v. Railway*, 38 Ann. 111.

And it further follows that, the employment being a dangerous one, as conceded and asserted by the defendant's counsel, the defendant company, the employer, should be legally held to the greatest care and diligence in the selection of the necessary materials, and everything else calculated to insure the safety of the employee in the prosecution of his work. *Ib.*; *Black v. Railroad Co.*, 10 Ann. 38; *Railroad Co. v. Derby*, 14 Howard, 486.

"It is indispensable to the employer's exemption from liability to his servants, for the consequence of risks thus incurred, that he should be free from negligence. He must furnish the servant with the means and appliances which the service requires for its efficient and safe performance; and if he fail in that respect, and an injury result, he is liable to the servant as he would be to a stranger." *Chicago R. R. Co. v. Ross*, 112 U. S. 377.

The next question that arises is, did the company comply with this requirement?

As stated, we are satisfied that the materials furnished the employee in this instance were not sound, and consequently not safe; and the record contains no evidence that these materials were carefully selected by the company, nor is there satisfactory proof that there was even a proper inspection of the same before being used.

Under these circumstances, we are forced to the conclusion that there was not that degree of care and diligence shown by the company that, under the legal principles we have announced, would exempt it from liability for the fatal injury of its employee in this instance. It was in fault, and from that fault resulted the death of the employee.

The judgment of the lower court is criticised by the defendant counsel as not being in accord with the pleadings, nor in response to the prayer of the petition, in decreeing the amount awarded (\$3,000) jointly in favor of the widow and the minor heirs.

This inaccuracy, if it be one, affords no ground of complaint to the defendant. It does not impose an additional burden, and it is a matter of indifference to the company to whom the money goes, so that it is final and conclusive against all parties, as it is. There is no complaint of the plaintiffs in this regard, and the money, when realized, can be adjusted between the mother and her children, according to their respective rights.

Reaching the conclusions announced, we find no reason for disturbing the judgment of the lower court, and it is therefore affirmed, with costs.

NOTE.—See note to *Weiden v. Brush Electric Light Co.*, *post*.

PIEDMONT ELECTRIC ILLUMINATING COMPANY v. PATTE-
SON'S ADM'R.

Supreme Court of Appeals of Virginia, April 17, 1888.

(84 Va. 747.)

HANDLING ELECTRIC WIRES.—CONTRIBUTORY NEGLIGENCE.

The intestate of plaintiff below, an employee of defendant, who had been long so employed and carefully instructed as to his duties and the dangers incident thereto, was killed while in discharge of his duty by the passage of an electric current through his body. He, with several other employees of the company, were in search of an "open circuit." The current was turned on, to the knowledge of intestate and for which there was satisfactory reasons; and as a measure of protection he had taken a "shunt-cord," which was defective, but the defects were patent, and he had selected it from several at the office of the company, leaving others there which were perfect. He could have completed the circuit with his body only by grasping the shunt-cord by a small portion at one end which had become stripped of its insulating cover, and grasping the line wire also by the uncovered end.

Held, that the company was guilty of no negligence, but that the intestate was negligent, and that no recovery could be had.

APPEAL from a judgment of the Corporation Court of Lynchburg, rendered upon a verdict of a jury for \$3,000 damages to the plaintiff below for the death of her intestate by the alleged negligence of the defendant.

Sheffey & Bumgardner and *Kean & Kean*, for plaintiff in error.

Kirkpatrick & Blackford, for defendant in error:

FAUNTLEROY, J., delivered the opinion of the court.

This suit was brought for damages for the death of the plaintiff's intestate, Miles Patteson, alleged to have been caused by the negligence of the defendant company, on the

23rd day of March, 1886, in the city of Lynchburg, Va., while the said Patteson was in the discharge of his duty as an employee of the said company. Upon the trial of the case there was no demurrer to the declaration, no objection to any portion of the evidence, nor instructions asked of the court by either side; and the jury, upon the evidence, rendered a verdict for the plaintiff for \$3,000 damages, apportioned, under the statute, to the widow and the infant child of the deceased. Thereupon the defendant company moved the court to set aside the verdict, and grant it a new trial, on the ground that the verdict was contrary to the evidence, which motion the court overruled, and entered judgment that the plaintiff recover against the defendant \$3,000, with interest thereon, to be computed at the rate of 6 per centum per annum from the 22nd day of December, 1888, till payment, and the costs, etc.

The only question presented by the record is whether the court below erred in overruling appellant's motion for a new trial, on the ground that the verdict of the jury is contrary to the evidence. The facts proved on the trial are not certified by the trial court, but the evidence is certified in full. Such being the case, the well-established rule of this court is that "the evidence must be plainly insufficient to warrant the verdict, to justify the court in setting it aside." *Priest v. Whitacre*, 78 Va. 151. The judgment complained of in this case will be affirmed or reversed according as the verdict of the jury shall be warranted or unwarranted by the evidence adduced by the plaintiff in the court below. The case for the plaintiff, who prevailed in the court below, rests upon the evidence of four witnesses:

First. Policeman Adams testified that "he is a member of the police force of the city of Lynchburg; that on the night the plaintiff's intestate came to his death, witness saw him hanging on the pole of the electric light at the corner of Eighth and Jefferson streets; he was dead, and was taken down in my (witness') presence. I passed him just before he went to that pole, and a few minutes after saw him dead. The defendant company had its city office

on Eighth street, near the Arlington Hotel. I knew Miles Patteson (plaintiff's intestate) when I saw him. He was a colored man, about thirty years of age. He was killed about eight o'clock in the evening of the 23rd of March, 1886; think he was a sober man, and seemed to be sober then. When I first saw him on the street, shortly before he was killed, he was carrying a short ladder, about eight feet long, the hands used in climbing the poles. The pole on which he was killed is about twenty-one to twenty-two feet high. I do not know what Patteson's business was—what his duties were. The electric lights in that part of the city were not lighted at that time. The lamps lit up twice—that is, there were *two flashes* between the time I first saw him on the street and the time I saw him on the pole, dead. I saw his overcoat flapping, and called to him, and got no answer. I then went and saw Mr. Fraley, the superintendent of the defendant company at Lynchburg, and told him there was one of his men killed, and where. In the interval between the two flashes, I walked about half a square. It was a drizzling night."

Second. R. C. Cobb, a colored man, a witness for the plaintiff, testified: "I did not see Patteson at the time he was killed. When I got there, they were getting him down. He was in the employment of the defendant company at the time. It was about ten minutes after eight o'clock in the evening, when he was got down. Patteson was a day trimmer. The work of a day trimmer was done between the morning and evening. They begin about seven o'clock in the morning, and get through about half-past twelve, the sooner the better. I was at that time a night inspector, which is night work altogether, and consists in seeing that the lamps are doing all right, and if not, to put them right. At that time there were three or four day trimmers; I don't remember which. There are three circuits in Lynchburg, and one man to each circuit, on the day force, and the same on the night force. I had been in the employment of the company about eighteen months. Miles Patteson had been in the employment of the company

under Superintendent Rockoff, who was superintendent before Mr. Fraley, for two or three months. He then quit, and went away from Lynchburg on some railroad work. He then came back, and went into the employment of the company again for three or four weeks, when he was killed. The practice in Lynchburg is for the current not to be on when the day trimming was being done. There is generally a test to see whether the circuit is complete. The current is not put on while the men are going around doing the day trimming; they don't use it in the day time. I do not know what time Miles reported he had trimmed his lamp that day. When I got to the office that evening they said circuit No. 1 was open, and all hands were fixing to go out to look for the trouble. The lamp could be examined without the current being on; but, when it is on, it gives notice by lighting up the lamps as soon as the trouble is found, and all hands who are out searching can quit. A day trimmer has to examine each coupling when he trims a lamp, to see that it is connected, and to clean the lamp, and see that it is in order. The right way to examine the couplings is to catch hold of the wires on each side of the coupling, and pull. Whenever there is a trouble at night at lighting-up time, all hands go out to find it. They often leave the current on, because as soon as the break of connection is found and connected, it notifies all of us. Very probably it might be so that their examination for an opening in the circuit could be made without the current. They (meaning the persons in charge) know the run of the machines; I do not. The connection of a circuit can be broken here (in the city) in the office; it could be done instantly. As soon as the connection is made on an open circuit with the current on, it lights up. I could not recognize the 'shunt-cord' that Patteson had that night. There were several condemned ones about the office at that time. The one I saw that night, after the accident, said to be the one he had, had about two inches missing. At one time the 'shunt-cords' had Keeright tape around them near the hooks, to insulate them. Mr. Fraley objected to the Keeright tape

which the hands had on their 'shunt-cords,' and had it taken off. They (the defendant) had Mr. Covert, Mr. Fraley's assistant, making good ones. It seems Patteson's switch (shunt-cord) he had that night was in a defective condition. When I got to the office that night the hands were all getting their shunt-cords. I got nine. Patteson got the one he had in the office. I can't say how he was killed. His right hand was burnt on the inside; his left hand was burnt also, but not so badly. In dry weather a man can handle the lamps very well. Now he can do it in any weather. The lamps have been improved. At that time the iron lamp frames would sometimes give you a shock — more than is the case now. The shocks then were more frequent. In wet weather the current will have more effect on you. Sometimes the cast-iron frame of the lamp gets charged, but those shocks from the lamps don't amount to much. They are not enough to make a man let go. The most shocks I have received have been in making couplings, and were caused by carelessness on my part in letting my hand slip; and, in changing carbons at night, if a man is not careful, he is liable to get a shock. I had Patteson with me when the first superintendent, Rockoff, was here, and got him so he could trim very well at night; day work he could do very well. He worked fast in the day, and was very particular at night. The opening could have been found without having the current on, by examining the couplings, and, when the opening was found, turning the current on to see if there was another, and then looking for that. All hands, six or seven, were out that night looking for the break of connection. I think there was one extra man, learning. Circuit 1 is from the corner of Fourth and Church streets to Washington street; from thence to White Rock Hill, to the far end of Main street. and back to Jefferson street, and half of Daniel's Hill. It had forty-nine or fifty lamps on it then. We started out about half-past seven o'clock; the accident was within half an hour afterwards. For the men who were out to examine the whole line, and report at the office,

would take about two hours. At the light-up time was when they found the circuit was open. Sometimes the broken connections may be in the machine at the station. The test of the current is made as soon as the last man reports. Sometimes, after this, a lamp has to be hung. I don't know whether there were enough shunt-cords in good order for all the hands. I got mine. It was lying on the table in the office. I know that Patteson had a shunt-cord in his hand, coming towards the door as I went into the office. Mr. Fraley said to me, as I went in: 'You are late; circuit No. 1 is open.' I answered: 'Yes, rather late.' I don't know what wages Patteson was getting; the usual wages were from \$10 to \$12 a week. Patteson, so far as I know, was all right. He seemed to have his mind always about him. I had known him two years. He was in Lynchburg most of the time. He was married. He had gone somewhere, to work on some railroad, between the times he was with the company. I saw Mr. Fraley very particularly instructing him about putting in carbons. He did not do night work except to inspect his circuit when they light up. As far as I know, Miles seemed to be a careful man. I was late on that night. When I got to the office, Miles was standing out in the room coming towards the door. All hands were going out to look for the break of connection."

F. M. Bryant, a white man, a witness for the plaintiff, testified: "At the time of Patteson's death, I was in the employment of the defendant company; was a day trimmer. I worked on circuit No. 3; his was No. 1. No. 3 is the one furthest from the river, on College Hill. Circuit No. 1 was open, and all started out to look for the break. The lamps flashed up twice. I started back then, and, knowing Patteson was a new hand at the business, went down towards the direction he had gone. The current was on when we started out. I took a shunt-cord with me. There were some four, five or six in the office in good order. It was the superintendent's business to see that the shunt-cords were in good order. Mr. Covert, Mr. Fraley's assist-

Illuminating Co. v. Patteson's Adm'x.

ant, fixed them. I don't think the one Patteson had was in good order. I think some of the insulation was off. Mr. Covert had been fixing the shunt cords, but I don't think they had finished fixing them. They were called off about some other work, and did not finish. I have had pretty heavy shocks fixing lamps at night. There is more danger in rainy weather. It had been drizzling that evening. The only change made was to look for the break when there was no current on. There is no necessity for the current to be on to look for a break in the circuit. Do not know what Miles' pay was; think it was \$9 a week. I was paid \$10 at that time. The usual pay was from \$9 to \$10. Miles was a clever colored man; seemed to be careful, sober; about 30 years old, in good health, and strong. Did not know him well, only for two or three weeks, and not much with him. He had been in employment of defendant company under Superintendent Rockoff, and at that time had done day trimming. He had been employed under Mr. Fraley about two or three weeks. The skin was burnt on the inside of both his hands. After he was killed, the insulation was off a part of the shunt-wire he had, and skin was sticking to the naked wire. Patteson got the shunt-wire he had when killed, that evening in the office. I never worked about electric lighting anywhere but here; had been working at it about 14 or 15 months at the time Patteson was killed."

Mosby H. Payne, Esq. (white), testified: "I had known Miles Patteson about two years. His wife was my house servant. He was at my house two or three times a day, and to his meals. Have seen him trimming the electric lamps. He was about thirty years of age, in good health, and of good physique, of average intelligence for a colored man, and had no special intellect, nor was he the other way. I don't think he had any education. I do not know whether he could read or write. Never asked what wages he got. He had no child at the time of his death. His wife was pregnant of a child, born since. She was greatly distressed at his death, and was very ill for some time.

She fainted when she heard of it, and fainted once or twice during the night. The doctors were with her all night. I sat up with her, too. She was confined to her bed for a week or ten days. Dr. Thornhill staid with her one or two nights. Her condition was alarming, especially during the first night. I saw Miles Patteson's body on Jefferson street, near the place on which he was killed. It was lying on the counter of a shop near by. This was about twenty minutes after eight o'clock. His hands were badly burnt—the right hand nearly to the bone. I do not know how long the illuminating by electric light had been in use in Lynchburg; I suppose some twelve or fifteen months. Patteson was in the employment of the defendant company, the last time, for about three or four weeks. He had, before that time, been away from Lynchburg working on some railroad."

This is, with the defective shunt-cord exhibited in evidence upon the trial, the whole of the plaintiff's evidence, as certified in the record. Testing the case upon the plaintiff's evidence alone, we are of opinion that the verdict is wholly unwarranted by the evidence, which, we think, fails to make out the plaintiff's case.

The gravamen of the plaintiff's case, as set forth in the declaration, is that Patteson's death was caused by the *negligence* of the company in whose service he was engaged when he was killed, as stated in the evidence, on March 23, 1886, in the city of Lynchburg, about 8 o'clock P. M., upon one of the electric lamp-posts of the defendant company. How the death was brought about the evidence does not disclose; and the case alleged or averred in the declaration is not sustained by the plaintiff's own evidence—the *pro-bata* do not sustain the *allegata* in the case. Each count in the declaration charges that, by the wrong and negligence of the defendant company, the electric current was caused to pass through and kill the body of Patteson while he was engaged in the discharge of his specially appointed duties in the service of the defendant company.

There is nothing in the plaintiff's evidence to show that the defendant company in any way, by commission or omis-

sion, caused the electric current to strike and pass through Patteson, and kill him; but, from the plaintiff's own showing, the inference of contributory negligence by Patteson, as the proximate *causa mortis*, is inevitable. The rule, as laid down by this court in the case of *Baltimore & Ohio Railroad Company v. Whittington*, 30 Gratt. 805, is: "If the defendant relies upon contributory negligence of the plaintiff to defeat the action, he must prove it, *unless* the fact is disclosed by evidence of the plaintiff, or may be fairly inferred from all the circumstances." It cannot be seriously contended that the mere fact that the current was on when Patteson was killed, was *negligence*. It is sufficient to say that this was and had been the mode of conducting the business from the start; and that Patteson, who had been in this service for many months, engaged to work in the business, and to take the peculiar risks and hazards of the business to be done in that way; and this is the reason why all the hands, including Patteson, took with them the 'shunt-cords' that night, when they went out to look for the break in the circuit. They all knew that the current was on and there were good and satisfactory reasons, as shown by the plaintiff's evidence, why it should be on after lighting-up time, not only to save several hours of time in finding out where the break was, but to prevent the city from being kept in darkness during the search for and repairing of the breach. There was no change in the state of things, caused by the defendant's action or non-action, from the time that Patteson, with others, went out to look for the break in the circuit, to the moment and occurrence of his death. He carried with him his shunt-cord; and, although it was defective, he knew its defects, and he selected it, and used it without complaint.

The plaintiff's evidence shows that there were three, four, five or six shunt-cords in the office in good order; and Cobbs, a colored witness for plaintiff, testifies that, when he arrived in the office late, Patteson was coming out with the shunt-cord which he had selected; and that he (Cobbs) got from those left there by Patteson his shunt-cord, which

was in good order. If, in fact, the defects in the shunt-cord used by Patteson caused his death, the evidence shows that they were open, patent, and visible to Patteson, who chose it for himself, and used it unhesitatingly and without complaint, of his own selection, with deliberation, and without necessity, requirement or direction so to do. The servant is bound to see for himself such risks and hazards as are patent to his observation ; and the employer does not stand in the relation of an *insurer* to the servant against injury caused even by such defects as are known or palpable to the servant in the due exercise of his own skill and judgment. Sherman & Redfield on Negligence, secs. 92 and 93 ; Wood on Master and Servant, sec. 326, pp. 679 to 681, and sec. 414, p. 791, and note 1. The evidence shows that Patteson had been, for many months, with a brief interval, in the service of the company in the same capacity he was in when killed ; that he had been carefully instructed in the care and attention necessary to his own safety, in the discharge of his dangerous duty, and that he did know how to use the shunt-cord with perfect safety to himself, and had twice turned on the current with the shunt-cord but a few moments before he received the shock which killed him. At the first flash Patteson knew that in his lamp the breach in the circuit was, and that in his efforts to make the connection, with his shunt-cord, great care and prudence were necessary ; and there was no hurry, urgency, necessity or reason for his putting himself in the line of the current, in the only way possible, by holding the shunt-cord with one hand by its metal end, and at the same time carelessly and inadvertently putting his other hand on the exposed end of the line wire, and thereby made his body a part of the circuit, through which the current passed and killed him. It is not charged—nor can it be implicated—that there was any defect in the line wire, in its structure or insulation ; a small part of the end of the line wire being necessarily left naked in order that the set-screw might be fastened to it in the connection with the shunt-cord to restore the circuit ; and even though Patteson was foolish

and careless enough to catch hold of the shunt-cord at its defective end, below its insulated part—at most not three inches of it—he would have been perfectly safe, and could not have been harmed by the current had he caught hold, with the other hand, of the line wire, two or three inches from its exposed metal end, where it was carefully and perfectly insulated and guarded. It is certain, from the very nature and necessity of the case, that but for the careless and negligent act of Patteson in grasping the naked end of the line wire—whatever may have been the condition of the shunt-cord—he could not have been killed or hurt by the current. In the case of *City of Richmond v. Courtney*, 32 Gratt. 792, it is held that, “where *negligence* is the issue, it must be a case of unmixed negligence to justify a recovery,” citing Dillon on Corporations, sec. 789, and cases there cited. And in the case of the *Norfolk & W. R. R. Co. v. Ferguson*, 79 Va., citing *Dunn v. Seaboard R. R. Co.*, 78 Va., it is said: “It must be proved that the injury was caused by the negligence of the defendant or his agent; and it must not appear, from the evidence, that the plaintiff's want of ordinary care and prudence directly contributed to the injury.”

We are of opinion that the plaintiff's own testimony fails to prove negligence on the part of the defendant company, unmixed by the concurring and co-operating negligence of the decedent, but for which the accident could not have occurred, and that, therefore, the verdict is wrong, and the judgment founded on it is erroneous, and that the verdict must be set aside, and the judgment reversed and annulled.

Judgment reversed.

RICHARDSON, J., absent.

NOTE.—See note to *Weiden v. Brush Electric Light Co.*, *post*.

COLORADO ELECTRIC COMPANY V. CHARLES LUBBERS.

Colorado Supreme Court, Oct. 16, 1888.

(11 Col. 505.)

ELECTRIC WIRES.—INJURY TO EMPLOYEE.

(Head note by the court):

Plaintiff, a carpenter in defendant's employ, was sent by it to remove one of its electric lamps and connect the wires with the circuit. The evidence showed that the usual time for turning on the electric current was 4.30 P. M. on cloudy days and 4.45 P. M. on clear days. Plaintiff testified that when he reached the lamp and began work, it was barely 4.15 P. M., and that the day was clear; that he knew nothing about electric wires, the work assigned him being outside the scope of his employment; that, while handling the wires, the current was turned on, and he received a shock, producing the injuries sued for. *Held*, that a nonsuit was properly refused; the questions of negligence and contributory negligence being for the jury.

The court charged that plaintiff had a right to believe that the electric current would not be turned on to the wires earlier than usual; and if they believed that on that day the electric current was turned on earlier than usual, and plaintiff was injured in consequence, the company was guilty of negligence. *Held*, no error.

Plaintiff was allowed to prove that, subsequent to the accident, defendant posted notices at its works warning all employees at work on its lines and circuits to quit such work at 4 o'clock, and not to continue the same without notifying the officers at the works. *Held*, that the admission of this evidence was reversible error.

APPEAL from the District Court of Arapahoe county.

Charles Lubbers, the appellee, brought this action against the appellant, the Colorado Electric Company, a corporation, to recover for personal injuries alleged to have been sustained by him by reason of the negligence of said company, and obtained a judgment for \$5,500 damages, and costs of suit, from which the appeal herein was taken. The answer denies the allegations of the complaint in the main, and charges the plaintiff with contributory negligence. At

the time of the alleged injuries, to wit, in December, 1881, the defendant was engaged in supplying lights to the city of Denver and its inhabitants, by means of an electric fluid, generated by it in said city, and conveyed from its works, by elevated wires, to lamps, located in different parts of the city, used as burners. The plaintiff was in its employ. The evidence tends to show that he hired to it as a carpenter, to assist in taking care of its electric-light towers; that a half past 3 o'clock in the afternoon of December 17, 1881, he was sent by the superintendent of the company, from its works in said city, to remove one of these lamps, connect the wires with the circuit, and return with the lamp to the works; that at that season of the year the usual time for turning on the electric current was from 30 to 45 minutes after 4 o'clock of each day—the earlier period being used for dark or cloudy days, and the later for clear days; that the day in question was a clear day; that it was dangerous to handle the wires when charged with electricity; that the plaintiff was inexperienced in the work he was so ordered to do on that occasion, and that it was outside of the scope of his employment; that he was sent, from the works to the lamp, on foot, and the distance, as variously estimated by the witnesses, was from one and a fourth to two miles; that, with ordinary speed, from 35 to 50 minutes were required or would be consumed in going on foot from the works to the lamp, removing it from its place, and connecting the wires; that he proceeded at a “good gait,” and was not delayed on the way, or in the performance of the work; that before starting on such errand the superintendent informed him that he would have to do it before the electric current was turned on; that in taking down the lamp, and while engaged in connecting the wires, the electric current was turned on, and thereby shocked, and fell to the ground or beneath, a distance of about 12 feet; that by means of the shock and fall he received serious and permanent injuries; that he was furnished with no tools or implements with which to do this work, and was given no instructions

the manner of performing it; that he knew at the time that it was dangerous to handle the wires when charged with electricity; that he did not then know what a "jumper" was—a piece of wire used to cut off the electric current between two points on a circuit—and had no knowledge of its use; that he used his hands to connect the wires, and while doing so the accident occurred; that he had no time-piece with him, and had made no observation as to the time of day, other than when he left the works, and that it was then half-past 3 o'clock in the afternoon; that the electric current was turned on earlier that afternoon than usual, and nearer to a quarter after than to half-past 4 o'clock, and that this accident occurred between such periods; that the effect of charging the wires of a circuit with electricity from the works was instantaneous throughout the circuit; and that when he took hold of the wires theretofore used to convey the fluid to the lamp which he had just removed, to connect such wires with the circuit, he was of the impression that the current would not be turned on before the usual time—a quarter to 5 o'clock on a clear day—and was satisfied that that time had not then arrived. The defendant introduced no testimony, but at the close of the plaintiff's evidence moved for a nonsuit, for two reasons: (1) That no negligence of the company had been proven; and (2) that the evidence showed contributory negligence on the part of plaintiff. This motion was denied. After verdict the defendant moved for a new trial, and such motion was also denied. Exceptions were duly preserved by the defendant to the rulings upon said motions, and to the admission of certain testimony, as well as to certain instructions given by the court to the jury. The only instruction which is questioned in the argument of counsel is as follows: "The plaintiff had a right to believe and expect that on the day in question the electric current would not be turned on to the wires earlier than usual; and if you believe from the evidence that on that day the electric current was turned on to the wires earlier than usual, and the plaintiff was injured in consequence thereof,

then the company was guilty of negligence, and the plaintiff is entitled to recover.”

E. O. Wolcott, for appellant.

Wm. B. Mills, for appellee.

DE FRANCE, C.: We are of the opinion that no error was committed by the court in overruling the motion for a nonsuit, or in giving the instruction complained of. The questions of negligence, and of contributory negligence, were questions of fact to be determined by the jury from the evidence in the case; and the instruction in question, when taken in connection with the testimony and the other instructions given, contains no error. The plaintiff was allowed to prove by the witness Geagan, over the objection of the defendant, that, subsequent to the accident complained of, the defendant put up certain hand-bills or placards at its works, warning all its employees engaged at work on its lines or circuits to quit such work at 4 o'clock, and to not continue the same without first notifying the officers at the works thereof. This was error, and we cannot say that the defendant was not prejudiced thereby. The liability of the defendant must be determined from what took place before and at the time of the accident. What it did afterwards, in the way of precaution, to avoid future accidents, should not be construed into an admission by it of a previous neglect of duty. *Morse v. Railway Co.*, 30 Minn. 465, and cases there cited. For this error the judgment must be reversed.

STALLCUP and RISING, CC., concur.

Per CURIAM: For the reasons assigned in the foregoing opinion the judgment of the court below is reversed.

Reversed.

NOTE.—See note to next case

JOSEPH WEIDEN V. THE BRUSH ELECTRIC LIGHT COMPANY.

Michigan Supreme Court, Jan. 18, 1889.

(78 Mich. 268.)

INJURY TO LINEMAN.—DEFECTIVE APPLIANCES.

The plaintiff, a lineman in the employ of defendant, was injured by the breaking of a cable to an elevator in which he was ascending to trim an electric light at the top of a tower.

There being evidence that the plaintiff went up in the elevator by order of the foreman, his superior, the trial judge properly refused to charge that if the plaintiff's sole duty was to trim towers, and that tower had been trimmed, he was not in the discharge of a duty and could not recover.

The claim was that the cable in question had become rotten and defective by use and exposure. It had been in use two and one-half years, and there was no evidence that it had ever been examined for defects, though four employees of the company testified that they had notified the superintendent that it was defective, and he did not deny it. *Held*, no error to refuse to charge that if the cable was manufactured by a competent firm, and if the defendant employed competent men, who made proper examination for defects and found none, the company would not be liable for a casual defect unknown.

APPEAL from judgment for plaintiff, rendered at Circuit Court, Wayne county. Facts stated in opinion.

Marston, Cowles & Jerome, for appellant.

Thomas Hislop, for appellee.

MORSE, J.: The plaintiff alleges in his declaration that the defendant is a corporation, organized and doing business under the laws of this State, within the city of Detroit. Said business is the constructing, operating, and maintaining a system of lighting apparatus used in lighting the city of Detroit, by means of electricity, conducted and maintained by wires, posts and towers; that, among others,

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a tower, with elevator and cable therein, is at the corner of Jefferson and Woodward avenues ; that plaintiff was an employee of the defendant, whose employment was to transfer lines from one pole to another, connect lines for conveying electricity, and generally to do the work of a "line-man." It avers that it became the duty of the defendant, in conducting its business, to use proper precaution in the construction of its towers and elevators, and cables therein, and so to construct the same, with materials of sufficient strength and durability, that said towers and elevators, and cables therein, would not break while being used by its employees ; to use proper care in keeping said towers and elevators and cables therein in good working order, and by testing, watching and supervising said cables and elevators, and repairing them, prevent them from becoming weak or rotten from exposure, and thereby liable to break, so that its employees could with safety ascend or descend the towers by means of said elevators, as became necessary while in the performance of their work and duty. The declaration further alleges that the defendant so negligently conducted itself by failing and neglecting to exercise such due and proper caution in constructing said towers and elevators and cables therein, of materials of sufficient strength and durability to enable its employees to ascend or descend said elevators without danger from said elevators or cables breaking ; by failing and neglecting to test, watch and supervise said cables and elevators, and to keep them in repair, and to prevent them from becoming weak, rotten and unsafe from exposure to the weather ; by negligently permitting the cable of the elevator at the corner of said Jefferson and Woodward avenues to become weak, unsafe and liable to break when used by the employees ; by negligently causing or permitting said elevator to be used by the plaintiff, while the said elevator was in a defective and unsafe condition by reason of the cable thereof being weak, unsafe and liable to break, and known so to be by said defendant ; that while said plaintiff, on the 11th day of February, 1887, was ascending said tower

in said elevator, by order of said defendant, ignorant of any defect or weakness in the cable of said elevator, and in the exercise of due care on his part, and by means of the neglect and want of care of the defendant's employees, officers, agents and servants, the cable of said elevator in said tower broke, which caused said plaintiff to fall down said tower a distance of seventy feet, from which said plaintiff was cut, bruised and injured, etc. The plea was the general issue. Verdict and judgment in Wayne County Circuit Court for \$750 damages in favor of plaintiff. The case comes here for review upon the charge of the court to the jury.

A brief statement of the admitted and controverted facts seem necessary to a correct understanding of the points involved in the assignment of errors. The defendant corporation lights the city of Detroit by electricity. This light is thrown out from the tops of high poles or towers, the current being carried to these tops by wires running from the place where the electricity is generated. There are lamps set or hung on these tops, and it is necessary to trim them every day. This is done by going up an elevator in the center. The elevator consists of a box or cage, at the lower end of which is a wire cable running to the top of the tower, and at the top passes around a wheel with a groove inclosing the cable. At the other end there is a heavy weight for the purpose of assisting the workmen in reaching the top. The plaintiff was in the employ of the defendant on the 11th day of February, 1887, and started to go up this tower, on the corner of Jefferson and Woodward avenues, in the elevator. When up about fifty or sixty feet the cable broke, and he fell down with the elevator, and was injured. So far there is no dispute as to the facts. It is claimed on the part of the plaintiff, further, that he was sent to this tower by the superintendent of the defendant corporation, in company with and subject to the orders of one Tom Fitzgerald, foreman; that he went up and trimmed the lamps on the tower at the post-office without any trouble. When

they came to the tower in question Fitzgerald told him to go up and see if it was trimmed. Plaintiff started to go up in the elevator, and when he had got up a few feet one Walsh, an employee of the defendant, hallooed across the street, and said, "Tom, that tower is trimmed;" and plaintiff then said to Fitzgerald, "Tom, there is no use going up, as long as it is trimmed; let her go." Fitzgerald replied: "You do as I tell you, and go on up." Plaintiff testifies that he must go up or be discharged, and therefore went on. He told Walsh to come and "give him a pull," and Walsh did so. He and Fitzgerald were both standing at the bottom of the tower on the first section, about twelve feet from the ground. Plaintiff went up two or three sections, and the elevator stopped. "There was a little ice on the cables, and the guys that went through the cage in the elevator clogged the holes up with ice, so she stopped, and we let her down about six inches or so, and started up again, and kept going that way until we got up to the seventh section," about 60 or 65 feet, and the cable broke. The defendant gave testimony in its behalf tending to show that there was so much ice on some of the cables that the foreman did not send plaintiff up some of the towers. There did not seem to be much ice on the tower at the post-office corner, and plaintiff went up and trimmed the lamps without difficulty. The foreman testifies that when they came to the post-office tower he looked at the cable, "and there did not appear to be hardly any ice on it, and so we spoke about using it, and he (Weiden) said, 'All right,' and got into the elevator, and I pulled on the running cable to help him." He further swears, in relation to the tower where the accident happened: "There did not seem to be any more ice on that, from general appearances, than the one at the post-office, and we concluded to run the elevator, and he got in the elevator, and started to ascend. * * * Mr. Walsh came across the road, and he says: 'That tower is trimmed.' 'Well,' I says, 'there will not be any use in going up;' and he said, 'Let her go, anyway.' Weiden spoke up, and said, 'Let her go, any-

way ;' and she was started. So I spoke to Mr. Walsh, and he came up and stood on the lower pedestal of the tower." He denies that he ordered plaintiff to go up after Walsh said the tower had been trimmed. All that he did was to acquiesce in the suggestion of Weiden that he should go up anyway. It appears that the last time this particular tower was inspected was before September 1, 1886. Three witnesses depose that they notified the superintendent of the defendant in 1886 that this cable was defective, one of them late in the fall. There was some dispute as to the condition of the wire of the cable at and about the place where it was broken, but there was sufficient evidence to warrant the jury in finding that it was so defective as to be unsafe, and that proper inspection would have disclosed its defective condition before the accident.

In his third request the counsel for the defendant asked the court to instruct the jury, in substance, that if the plaintiff's duties on the day of the injury were to trim towers, and that only, and the tower had been trimmed, and there was no occasion for his going up to trim it, he could not recover, as he was not in the performance of any duty. It was properly refused. If it was the duty of plaintiff, as it seems to be conceded, to trim lamps under the direction of the foreman, and the foreman ordered him to go up the tower for that purpose, or to see whether or not the lamps had been trimmed, it can make no difference whether such lamps had been trimmed that day or not. The foreman, if they had been trimmed once, would have had the undoubted right to see that they had been trimmed properly, and to direct that they should be trimmed again if the work had not been well done in the first place ; and it would have been, in either case, the duty of plaintiff within his employment to obey the foreman.

The defendant's fourth request was as follows: "If you find that the ice on the cable made it dangerous for the plaintiff to go up, using the cable, that he knew that fact, and that he used the cable notwithstanding such knowledge, and that he could have gone up in another way that

would not have subjected him to such danger, then he cannot recover." We find no evidence to support this request. Neither the plaintiff nor the foreman supposed there was any danger on account of the ice. Yet the court substantially gave it, only qualifying it by stating that if, under the circumstances, he "recklessly attempted to ascend by means of this elevator, in that way contributing to this accident, he cannot recover in this case." There was no error committed in this action of the court. The matter of the ice making it dangerous to ascend this cable, and the plaintiff's knowledge of the danger from that source, was not in issue by the proofs, and the court might well have said nothing about it. What he did charge could not have harmed the defendant, when it was not entitled to have any such issue put to the jury. The plaintiff might complain, but not the defendant.

The fifth request was as follows: "If you find that the towers in question were constructed by another company, that the cable on this tower was manufactured by a competent and careful firm engaged in such business, and that the defendant employed suitable and competent men to examine the same, and that they did so on all proper times and occasions, and discovered no defects, the company would not be liable for the accident caused by a casual defect unknown." In this case there was no question but that the towers, elevators and cables were properly constructed. The claim of the plaintiff was that the cable had become broken and ragged on the outside; that enough of the wires had rusted off, and others weakened by rust, so that the cable was weak, rotten and defective; that these facts had been made known to the superintendent by several persons; and that the company, after such notice, had not only failed to replace this cable by a new one, but had neglected to make any examination of the same to ascertain if these defects existed. The testimony of the superintendent shows that this cable had been in use since August, 1884, at least, and there was no evidence that this tower, elevator and cable had ever been examined for defects.

The superintendent swears that he had reports in writing of the examination of the towers, but he did not produce the reports, nor was any witness sworn that had examined them. He also admits that there was no special examination of this particular tower in 1886, and he does not remember of any reports being made to him of any defects in this cable, but he "does not depend on his memory; we depend upon records, and on the examination of these records at noon I could not find any such reports." I think the request was properly refused. The court said as to this matter: "It is also claimed on behalf of defendant that they had a number of cables in use in the city of Detroit such as were used in this tower, and that these cables were purchased of a well-known manufacturer, and that only in two or three cases have they discovered any defects in these cables; that the cable in question was able to stand a strain of three and a half tons. All these things may be taken into consideration by you as bearing on the right of the plaintiff to recover; bearing upon the care and caution that the defendant has exercised in looking after these cables, and this cable in particular; also the testimony that they have given of the examination made of this cable by men in the employ of the defendant, and what care they took to see that it was in proper condition so as to be used by the working men in their employ." As before said, there was no competent evidence in the case that any examination of this tower and its cable had ever been made. The defendant showed by its superintendent that it was customary every fall to send competent men around to see if the towers, elevators, and cables needed any repairs, and that there were reports in the office showing such work, but there was no special report in relation to this tower, and no reports were produced. The superintendent did not himself know of any examination of this tower, nor was any proof given of any such examination. Four different persons, who were or had been employees of the company, testified that they notified the superintendent in 1886 of defects in this cable verbally. He does not undertake to

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deny it, except as he swears he cannot find any written reports to that effect, and he puts no reliance upon his memory outside of these records. The case then stood squarely before the jury, and was so put to them by the court that, if they believed the superintendent was notified as these witnesses testified, the defendant was negligent, there being no proof of any attention being paid to the notice of the defects. If the plaintiff was ordered up this tower, as he and one other witness testified, he was entitled to recover. If he went up of his own accord, as the superintendent and Walsh testified, he could not recover. We think on the question of the negligence of the company the court, in permitting the jury to consider this testimony of the examination of the towers, etc., by their employees, was more indulgent to the defendant than the case made by it warranted. The evidence failed to show, by any competent testimony, any proper care or caution on the part of the company. And there was no evidence of any contributory negligence on the part of the plaintiff, unless the jury found that he went up of his own motion. The judgment is affirmed with costs. The other justices concurred.

NOTE.—The questions involved in this and the three preceding cases are not peculiar to electrical companies; belonging rather to the law of master and servant, of negligence and contributory negligence. The actions are, however, of a kind to which companies using electrical appliances in their business are peculiarly exposed.

LEWIS H. SMITH, Respondent, v. THE GOLD AND STOCK
TELEGRAPH COMPANY AND THE WESTERN UNION TELE-
GRAPH COMPANY.

N. Y. Supreme Court, General Term, Second Department, December, 1886.

(42 Hun, 454.)

UNLAWFUL DISCRIMINATION.— UNREASONABLE REGULATIONS.

In a contract of a telegraph company with a broker, by which it agreed to furnish him a stock "ticker," a clause providing that the company might remove the instrument at any time when, in its judgment, there had been a breach of the conditions of the agreement, *held*, not a reasonable regulation, and no defense to an action brought to restrain the discontinuance of the service contracted for.

APPEAL from an order continuing a temporary injunction, restraining the removal of a "ticker" from plaintiff's office, where it had been placed in pursuance of a contract with the defendant. Facts appear in head-note and opinion.

Dillon & Swayne, for the appellants.

J. W. Hawes, for the respondent.

PRATT, J.: It has been settled for hundreds of years that an inn-keeper is bound to receive the guest who applies for accommodations. So is it well settled that a common carrier must receive and transport goods offered him for that purpose, impartially and without discrimination between parties applying.

These obligations do not rest on contract, but on the ground that when one is engaged in a business, public in its nature, he must, if public policy requires, serve the public impartially. The occasions for the application of

this familiar principle are by no means diminished by the formation of corporations which carry on a great part of the business of the country. And in applying these rules to a corporation, the charter of the corporation is not solely to be consulted in arriving at the measure of its obligations to the public. When the charter provides that a corporation shall engage in some specified public occupation, no doubt a reference thereto will be an easy way to establish its obligations to perform such service. But we do not accede to the doctrine that when engaged in a business concerning the performance of which its charter is silent, a corporation is freed from the obligations which ordinarily attach to a natural person engaging in such occupation.

Had defendants in the present action answered that collecting and distributing commercial intelligence being foreign to the objects for which they are incorporated, they had in consequence abandoned that branch of their business and withdrawn their "tickers" from all offices except the plaintiff's, we should not hold that they could be compelled to carry on the business for his benefit. But so long as collecting and supplying quotations is carried on by them, as it is conceded to be at present, they should render equal and impartial service to those who comply with reasonable regulations.

What regulations are reasonable may not in all cases be easy to determine. But there need be no hesitation in saying that the clause in their contract permitting them to discontinue the service when *in their judgment* a breach of conditions has been had, is not a reasonable regulation and affords no defense to this action. No man can be judge in his own case, and to justify defendants in refusing to perform service, there must be a reason that the court can pronounce sufficient.

Nor is it a defense to the action that an action at law for damages would lie in plaintiff's favor. It is easy to see that accurate proof of the amount of damage sustained would be impracticable; and where a right is clear, the fact that a defendant is able and willing to pay for the liberty

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of infringing upon it, is not a very satisfactory ground for refusing an injunction.

The order continuing the injunction must be affirmed, with costs and disbursements.

Present—BARNARD, P. J., DYKMAN and PRATT, JJ.

Order affirmed, with costs and disbursements.

NOTE.— See note to *Smith v. W. U. Tel. Co.*, *post*.

This case is cited in *Commercial Union Tel. Co. v. N. E. Teleph. and Tel. Co.*, *post*.

DAVIS V. ELECTRIC REPORTING CO.

Common Pleas No. 2 of Pennsylvania, May 7, 1887.

(19 Weekly Notes of Cases, 567.)

DUTY OF STOCK-TELEGRAPH COMPANY.—MANDAMUS.

A stock-telegraph company, incorporated for the purpose of maintaining telegraphs and furnishing market quotations, *held*, compellable by mandamus to replace “ticker” and furnish service at the office of a customer from which the “ticker” had been removed.

SUB petition for mandamus.

This was a petition by the president and secretary of a voluntary association known as the Philadelphia Petroleum and Stock Exchange, setting forth that the defendant company, organized under the laws of the State of New York, and doing business in the city of Philadelphia, under the name of the Merchants' Telegraph Co., Quotation Department, was engaged in the business of furnishing market quotations and other news to individuals and corporations; that in pursuance of a contract with plaintiff association, it placed two instruments for the purpose of furnishing market quotations in the office of the said association, but that in June 29th, 1886, the said defendant had removed

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the instruments from the plaintiff's office against its wishes, and without its knowledge, and had refused since that time to replace the said instruments or to continue to furnish quotations, although requested by the petitioners to do so, and tendered by them the usual rental price of such service.

The charter of the defendant, as stated in the petition, declared its business to be the "manufacturing, buying, selling, leasing, sub-leasing, operating, and maintaining printing telegraph, and other electrical instruments and machinery, and collecting and furnishing market quotations, and other news to individuals, firms, corporations and newspapers throughout the United States and elsewhere."

The prayer of the petition was for a writ of mandamus to compel the defendants to furnish the petitioners with tickers, service, etc. No answer was filed to the petition, which had been duly served, and no counsel appeared.

Samuel B. Huey, for petitioners.

The COURT: Mandamus awarded, commanding the Electric Reporting Co. to forthwith furnish to the Philadelphia Petroleum and Stock Exchange quotation instruments or "tickers," and the necessary service connected therewith.

NOTE.—See note to *Smith v. W. U. Tel. Co.*, *post*.

STERRETT ET AL. V. PHILADELPHIA LOCAL TELEGRAPH CO.

Common Pleas No. 2 of Pennsylvania, June 24, 1886.

(18 Weekly Notes of Cases, 77.)

DUTY OF TELEGRAPH COMPANY.—REMOVING "TICKER" FROM "BUCKET-SHOP."—INJUNCTION.

Injunction refused, to restrain the removal, by a telegraph company, of a stock "ticker" from a "bucket-shop," such removal being demanded by the stock exchange of the city, under penalty of forbidding the company to do business at the exchange.

SUB exceptions to master's report.

Bill in equity for an injunction to restrain the defendant from removing or disconnecting certain stock indicators in the plaintiff's office, and from discontinuing to furnish stock quotations to the plaintiffs at their office by means of these indicators.

The facts alleged in the bill were as follows :

The plaintiffs were engaged in the business of buying and selling railroad and other stocks, and required the latest information obtainable as to the state of the stock market. The defendant was engaged in the business of a common carrier as a telegraph company, furnishing to the public the latest information concerning the prices of stocks and other property. For some time past the plaintiffs had received this information at their office from the defendant, by means of instruments and wires, and for these services had paid the defendant all its lawful charges. On January 6, 1886, the defendant gave notice to the plaintiffs that the service of furnishing stock quotations would be discontinued on January 16.

The answer denied that the defendant was a common carrier, and that the business of collecting and distributing stock quotations was a part of its public employment as a telegraph company. It averred that it was agreed in the contract between the plaintiffs and the defendant that the service should be discontinued on one week's notice by either party, and that the defendant was compelled to discontinue it in order to avoid being prevented by the Philadelphia Stock Exchange from getting stock quotations or otherwise carrying on its business at that exchange. It is also stated that the plaintiffs' business was that of a "bucket-shop," an immoral one and against public policy, and was entitled to no protection in a court of equity.

The case was referred to Charles E. Morgan, Jr., Esq., as master, who found as follows:

"First. The collection of information concerning the prices of stock, securities and other commodities, in the city of New York and elsewhere, and of selling the same to

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customers in the city of Philadelphia, is not within the scope of the franchises and privileges vested in the defendant under its charter. The business which the defendant is authorized to carry on is that of a telegraph company within the city of Philadelphia, and is specifically defined to be that of transmitting and delivering messages to and from any and all parts of said city, with generally all the powers, rights, privileges and franchises of telegraph companies in said city. The creation of a bureau of information and the distribution of information by wires and tickers directly to customers, is entirely distinct from, and outside of that of transmitting and delivering messages sent and received over its wires.

“The Legislature has not conferred upon the defendant the privilege, nor imposed upon it the duty, of collecting information of the character referred to, or of any other character, and of disposing of the same to any one. It is therefore entirely competent for it to refuse this service to any ~~ap~~ persons demanding it. The duty which it does owe to the public, imposed by its charter, and arising from the privileges and franchises thereby vested in it, is that of a telegraph company, which, while not strictly that of a common carrier, is in many respects similar thereto, and may be briefly defined as that of furnishing to all who may apply to it, without unjust or unreasonable discrimination, facilities for sending and receiving messages over its lines within the territory in which it is authorized to operate. *Metropolitan Grain and Stock Exchange v. Chicago Board of Trade and The Mutual Union Telegraph Company*, 15 Fed. Rep. 847; *Bradley v. W. U. Telegraph Co.*, Cincinnati Law Bulletin for 1883, 223.

“There is no real authority for the plaintiffs' claim that if a corporation carries on a business which is *ultra vires*, to which the exercise of privileges conferred by law is essential, the business which is unauthorized is subject to the same rule as to the rights of the public accommodation without distinction, which applies to the exercise of those authorized by the charter.

“Second. That the business in which the plaintiffs are engaged, and for which they desire to use defendant’s instruments, and the information as to quotations of stocks, etc., furnished thereby, is not that of buying and selling stocks or securities, either as principal or broker, but of wagering upon the rise or fall of the prices of the same, and that it is seldom intended by either party to these transactions that the delivery of any property shall take place. That such a business is unlawful and against public policy has been held by the Supreme Court of Pennsylvania in numerous cases. *Kirkpatrick v. Bonsall*, 22 Smith, 155; *Fareira v. Gabell*, 8 Nor. 89; *Dickson’s Executor v. Thomas*, 1 Outer. 278; *Ruchizky v. De Haven*, Id. 202. See also *Bradley v. W. U. Tel. Co.*, *supra*, and *Bryant v. W. U. Tel. Co.*, 17 Fed. Rep. 825.

“It follows, as a necessary consequence, that if the collection and sale of this information were authorized, and within the scope of defendant’s charter, the plaintiff would not be entitled to the relief prayed for. Indeed if the bill had been one to compel the defendant to transmit to or deliver from plaintiffs, telegraphic messages over its wires, for the avowed purpose of enabling them to carry on the business of betting or wagering upon the rise or fall of market prices of stocks and securities, the defendant would have been justified in a refusal so to do, and the plaintiffs would not be entitled to relief from a court of equity.”

The master reported that the bill be dismissed, and the plaintiffs filed exceptions to the report.

Isaac S. Sharp, for the plaintiffs.

Silas W. Pettit, for the defendant.

The COURT: On the main question in this case, that the gathering of news and furnishing it by telegraph or otherwise, to customers under contract, is not a part of the franchise or corporate duty of the respondent, we agree with the learned master, and think it unnecessary to do more

than refer to his report, where the reasons for this conclusion are fully and convincingly set forth.

With the second ground of the master's report, that the business of complainants is against public policy and unlawful, and that, therefore, complainants are not entitled to relief, we are not prepared to agree. We believe no case has gone so far as to decide that the lender of money may not recover it at law, though he knew the borrower intended to use it for gambling. If, therefore, it were part of the public duty of the respondent to furnish the information called for by the bill, we are not prepared to say that the use likely to be made of it by this particular plaintiff would be a good reason for refusing to furnish it to him. But being of opinion that respondents are under no obligation to furnish the information at all, except under voluntary contract, it is unnecessary to decide this question at present.

On the main contention in the case, therefore, the complainants must fail. The bill, however, seeks to restrain the removal of certain telegraphic instruments called "tickers" from plaintiffs' offices. If these instruments are solely used in the transaction of the respondents' business in furnishing the information specified in the bill, then the right to remove them follows from this opinion; but if they are part of the general apparatus of telegraphing, and constitute part of the facilities for sending and receiving messages, which respondents, in the exercise of their corporate franchises, are bound to furnish to all applicants impartially upon the same terms, then the plaintiffs may have a right to their continuance for such purposes alone. This distinction was not made before the master, and we are not sufficiently advised upon the facts to decide it now. If complainants desire, they may amend their bill by adding a prayer for relief on this point, otherwise a decree will be entered generally for the respondents.

Opinion by MITCHELL, J. :

July 3, 1886. The plaintiffs asked for more time to collect the evidence they needed before amending the bill. The court was of opinion that no sufficient cause for exten-

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sion of time was shown, and a decree was entered, dismissing the bill with costs.

NOTE.—*Merrick et al. v. Phila. Local Tel. Co., Jenkins v. Same*, and other cases on the same point were submitted by counsel to be ruled by the decision in this case.

See note to *Smith v. W. U. Tel. Co., post*.

WILLIAM CAIN v. THE WESTERN UNION TELEGRAPH
COMPANY.

Cuyahoga County, Ohio, Common Pleas, Oct., 1887.

(18 Cinn. Weekly Bulletin, 267.)

DUTY OF TELEGRAPH COMPANY.—STOCK “TICKER.”—INJUNCTION.

A telegraph company, which is the only agent of the Chicago board of trade for distributing its stock quotations, and which makes such distribution by means of “tickers” in the offices of the different customers, cannot be enjoined from removing its ticker from the office of a person to whom it has been forbidden, by its principal, the board of trade, to furnish quotations.

S. M. Eddy and J. K. Hord, for plaintiff.

Ranney & Ranney and E. J. Blandin, for defendant.

STONE, J. : This case is before the court upon an application for a temporary injunction, a restraining order having heretofore been allowed, pending this hearing.

The plaintiff, as appears from his petition, is engaged in the business of a commission broker, dealing in grain, provisions and stocks, in this city ; that in the prosecution of his business it was necessary to have, in connection with it, telegraphic communication with the Chicago board of trade, and to that end there had been placed in his office two instruments commonly called “tickers,” by means of

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which the market reports, as reported from the Chicago board of trade, were hourly, perhaps, during the business hours of the day, communicated to him for his own use and benefit. He says that these communications he received from the Western Union Telegraph Company, the defendant. It is alleged that that is a public corporation, incorporated under the laws of the State of New York, and that, being a corporation of that character, he is entitled to have communications delivered to him upon the same terms that are charged and received by the telegraph company from other people engaged in a similar occupation; and he alleges that it threatens to disconnect its wires and remove these ~~tickets~~, without any cause therefor, he having on his part ~~made~~ payment according to his contract with the telegraph company; that he has violated no provisions of his contract with it, and, by reason of the public character of the corporation, he ought to have these messages delivered as they are delivered to other people engaged in a similar business.

The question, then, presented is whether this petition, under the proof submitted, makes a case for a temporary injunction.

It is claimed, that while the Western Union Telegraph Company could not, perhaps, in the most technical sense, be said to be a common carrier, yet the business being of such a public nature, being a public corporation, exercising public franchises, *e. g.*, eminent domain, that the principles ordinarily applicable to common carriers are made applicable to telegraph companies, and that being so, they ought not to be permitted to discriminate and say that these daily quotations emanating from the Chicago board of trade should be delivered to one person and not to another, but should be furnished to all persons desiring them and willing to pay such reasonable charges as the company might exact for its services. That, I understand, is the claim made by the plaintiff.

On behalf of defendant it is contended, first, that the Chicago board of trade is a private corporation, organized and chartered under the laws of the State of Illinois, for the

purpose of dealing in grain and produce among the members of such exchange or board of trade, and that the information in the shape of market rates, made or fixed by reason of their transactions, is the property (if it has a property quality at all), of the board of trade, and that, from the fact that they are a private corporation, they have the right to communicate the intelligence they possess, growing out of their transaction, to whomsoever they please, and they may decline to give it to any person if they see fit.

Second. But, however that may be, they say that the contract with Mr. Cain had in it a provision in this language :

“ In case the messages are found to be used in violation of this agreement, or in case of failure to promptly pay the charges for the same, as required by the telegraph company and the board of trade, or for any other reason satisfactory to you, and with or without cause, the right is conceded, that, with or without previous notice, the sending of such messages may be discontinued at the pleasure of the board of trade.”

I read from a communication, signed by plaintiff and addressed to the Chicago board of trade, which, by virtue of its acceptance, I take to constitute a contract between the parties named.

So it is claimed that under the very contract had with Mr. Cain, it was the right of the board of trade to discontinue furnishing him the quotations whenever the board of trade, in its own judgment, saw fit, and to discontinue without previous notice and without alleging any reason therefor. And in this connection, too, as supporting that proposition, it is contended that plaintiff, in his contract relations with the telegraph company, further stipulated in these words :

“ I further agree, that you may forthwith discontinue said service without further notice, whenever, in your judgment, any breach of the above conditions shall have been made by me, or whenever directed so to do by the Chicago board of trade.”

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It is not doubted, indeed, it is conceded upon argument, that before the commencement of this cause the Chicago board of trade notified the Western Union Telegraph Company not to continue the delivering of their quotations to this plaintiff.

It is contended, thirdly, on the part of the defendant, that, whatever may be the rights of this plaintiff against the Chicago board of trade, he is not entitled to the relief sought here against the Western Union Telegraph Company, for the reason that the Western Union is simply the agent of the board of trade to deliver messages to whomsoever the board should designate as agents authorized to receive its quotations, and that it has no control over the matter—but when directed to discontinue furnishing this information, it has no alternative but to obey.

These are the principal propositions urged on behalf of the telegraph company.

By way of reply to the claims made respecting these contracts and the right reserved in the board of trade to remove these tickers and discontinue the market quotations whenever they see fit, it is said that such provision in the contract are void as against public policy, perhaps, or at least in opposition to the broad principle contended for, that this board of trade, in the very nature of its business, while it is a private corporation, and professedly is carrying on a private business, yet, in the language of some of the decisions, it is a private business “affected with a public interest,” and therefore subject to public control, and that that feature of the contract ought to be nugatory as against the proposition I have named; that the principle so clearly and forcibly laid down by Chief Justice WARRE in the case of *Munn v. The State of Illinois*, 94 U. S. Reports, 113, is applicable in this case. That was an action brought to contest the validity of a statute of the State of Illinois, by which it was sought to control and regulate the business of elevating grain.

The statute declared these elevators (owned and operated by private individuals) to be public warehouses, and fixed

the maximum rate that these elevator men might charge for elevating grain. The Supreme Court of the United States, in that case, sustained the law, and held that their business was of such magnitude and character, in connection with the commerce of the country — “standing in the gateway of commerce,” so to speak — that it was a private business “affected with such a public interest,” that the public, by its Legislature, and if not by its Legislature, by its courts, might fix and determine what would be reasonable in the discharge of that business, and practically held that they might not discriminate, and they might not say that they would elevate grain for one man at one figure and for somebody else at another figure, but must serve all upon equal and reasonable terms.

Now, the question is, can that principle be applied in this case? It has been held by Judge BLODGETT, in a case reported in 15th Federal Reporter, 850, decided in the Circuit Court for the Northern District of Illinois, that this principle did not apply to the Chicago board of trade. He says that it is a private corporation; that “their franchise as a corporation allows them to hold a limited amount of property, and to prescribe rules and by-laws for the government of the members and the transaction of business between them. Their sessions are not required to be public, and nothing is stated in this bill showing or tending to show why persons not members of the board should have any right to be informed as to prices or the extent of dealings of the board.”

He goes on to say:

“I deem it sufficient, for the purposes of this motion, to say that this court has heretofore decided, in cases which seem to me entirely analogous to this in principle, that the board has control of its own floor, and can admit such persons as it sees fit; that it can make its transactions wholly secret, and keep them within the knowledge of its own members, or make them public so far, and only so far, as the board itself or its members may see fit to do so. A membership of the board is expensive” (said, I believe, to cost

ten thousand dollars), "and an admission to membership is wholly within the discretion of the proper officers of the association."

Then he proceeds to state, at some length, that the information which they have is entirely private, and that they may communicate it to whomever they please. There are two or three decisions of that general character.

On the contrary, Chancellor TULLEY, of Chicago, in the case of *Public Grain and Stock Exchange v. W. U. T. Co.* (Circuit Court, Cook county, May, 1883), held that the business transacted upon the floor of the board of trade is "affected with a public interest" to an extent which would authorize the Legislature, and the courts in the absence of legislation, to prohibit the board of trade exercising any discrimination as to who shall receive from the telegraph companies these market quotations, or as to what telegraph companies shall be allowed facilities for distributing the information to the public.

I am not at all willing to adopt the position taken by Judge BLODGETT. I am not prepared to say but that this board of trade is conducting a business of such a character and of such an extent, affected with such public interest, that, in a proper proceeding, it might be required to furnish this information to any person demanding it, upon such terms as should be held reasonable; provided always, of course, the business or the information obtained was used for lawful and legitimate purposes.

But, whatever we may say of the application of that principle in a proper case, the question presents itself, can it be enforced in this case? I am disposed to think not.

In 1884, or thereabouts, the Chicago board of trade discontinued the practice that had theretofore prevailed of permitting the reporters from the different telegraph companies to come upon their floor, collect their quotations and market reports, and distribute them about the country to whomever the telegraph companies saw fit. About the time I have indicated, the telegraph companies were notified that these message-gatherers or news-gatherers would from a cer-

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tain date be excluded from the floor of the board of trade, and that the board of trade itself would take under its control the furnishing of the information which made up its daily quotations, and would furnish that information to such authorized agents as it might appoint throughout the country, and that such agents might make such terms with the telegraph companies by way of paying charges for communications as might be agreed upon between such persons and the telegraph companies, and at the same time contracted with the telegraph companies to make certain charges and collections on its behalf by way of toll and in payment for the information furnished, and after that was done all those throughout the country who had direct communication with the Chicago board of trade, and obtained daily quotations, became the agents of this board, or at least occupied contract relations with it, and paid such stipulated charges, under, perhaps, another contract with the Western Union Telegraph Company or other companies, as might be agreed upon for this information.

Now, it is said, that for a business of such magnitude the company runs a wire along its poles from Chicago to the great cities east and west, and uses that wire exclusively for the transmission of the information derived from the Chicago board of trade, to wit, the market reports, and that business is so continuous during the business hours of the day — every few moments, perhaps — that, instead of sending messenger boys from the offices of the Western Union Telegraph Company to these different agents in the different places, they run a wire into the different offices of the brokers and the bankers, and put there an instrument that will write out the communications, which serves, very much better than a messenger boy could, the purposes of a messenger boy ; and I take it, because that system is adopted for the transmission of the information and for the carrying on of this business, legally it stands upon no different basis than if each message was sent by the board of trade as we ordinarily send messages, and delivered by a messenger boy ; and if that is so, it is a little difficult to see

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how the court can enjoin the Western Union Telegraph Company from discontinuing sending its messenger boys with messages to this plaintiff's office, when the Chicago board of trade has said to the Western Union Telegraph Company: "We shall hereafter deliver to you no more messages to be transmitted to this plaintiff," and if they are not delivered, we do not perceive how the telegraph company could rightfully transmit messages that are designed for other people.

Now, as I say, before 1884, these telegraph companies collected and furnished this information themselves, and sent it to whoever wanted to pay for it; and if that were the mode of doing business now, I do not hesitate to say, that a company carrying on business as a telegraph company does (a public corporation exercising the right of eminent domain) ought not to be permitted and would not be permitted to discriminate and say this information may be furnished to one and not to another, when both offer to pay the same charges. But we are disposed to think that this principle cannot be put into operation as against this company, occupying the relations it does to the Chicago board of trade, and that if the plaintiff in this case has any remedy at all, it is by a proper proceeding against the board rather than against the Western Union Telegraph Company. Entertaining these views, the application for an injunction must be refused.

NOTE.—See note to *Smith v. W. U. Tel. Co.*, *post*.

SMITH v. WESTERN UNION TELEGRAPH COMPANY.

Kentucky Court of Appeals, Jan. 6, 1887.

(84 Ky. 664.)

FURNISHING "TICKER" TO BUCKET SHOP.

The keeping of a bucket shop being a gambling and therefore illegal business, a telegraph company is not bound to furnish it with market reports, either by virtue of its duty as a public servant, to serve all customers without discrimination, or by virtue of a contract. Injunction forbidding removal of ticker, *held* improperly granted.

APPEAL from Louisville Chancery Court. Facts appear in opinion.

Emmett Field, for appellant.

Rozel Wissinger, for appellee, defendant.

BENNETT, J., delivered the opinion of the court.

The appellant brought suit in the Louisville Chancery Court, against the appellee, in which he alleged, in substance, that he was the owner and proprietor of the Louisville Cotton, Stock and Provision Exchange; that he was a merchant, and his business consisted in the buying and selling of grain, provisions and other merchandise; that, in order to enable him to carry on his business successfully, and to compete with other persons engaged in similar business, it was absolutely necessary that he should be promptly and constantly informed of the prices of such commodities in the leading markets of Chicago and New York, etc.; that the appellee had for many years past, combined with its regular business of telegraphing messages for the benefit of the public, the business of collecting the market reports in

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the leading business centers of this country ; that the principal market for grain and provisions was the Chicago board of trade ; that the appellee had, by contract, collected said reports, and delivered and distributed them from the main office of the appellee to the respective offices of its customers, by means of its wires and a printing machine called a "ticker ;" that, by contract, appellant, as one of appellee's customers, was entitled to the prompt delivery, at his business office, by means of said wires and ticker, of all reports of the market prices of grain, provisions, etc., from the Chicago board of trade and other leading business centers, as received by appellee over its wires ; that appellee, as such dealer, for the benefit of the public, had no right to refuse to furnish the appellant with said reports, the appellant paying a fair compensation therefor, nor to discriminate against appellant in favor of other customers engaged in similar business ; that appellee threatened to cease to furnish appellant with said reports, and to deprive him of the use of said ticker, unless he would sign a contract agreeing to give appellee all of his message business at regular message rates, etc. ; that appellant refused to sign said contract with said clause in it, because the same was illegal, etc.

The lower court, in accordance with the prayer of appellant's petition, granted a temporary injunction restraining the appellee from stopping the supply of said reports to the appellant, and from removing said ticker.

By the appellee's answer and amended answer, it denied that appellant was a merchant, or that his business consisted in buying or selling grain, provisions, or other merchandise, or that it was then under a contract with the appellant to continue to allow him the use of said ticker, or to furnish him thereby with all market reports.

The evidence tends strongly to show that the appellant, at the time complained of, was not a grain and provision merchant, but was the keeper of a bucket shop, which is described as a place where grain, provisions, etc., are posted on blackboards as they come in on the ticker. The shop

buys or sells indifferently, and always at the price appearing for the time being on the blackboard. Should a customer wish to make a deal in June wheat, say buy 1,000 bushels, he sees the last quotation, say one dollar per bushel, he gives the shop the margin, say one cent on the bushel, or \$10; the shop charges a fixed commission, say one-quarter of a cent per bushel; the shop does not notify the customer of the fluctuations of the market, but he looks out for that on the blackboard. Wheat on the next quotation goes down say three-quarters of a cent; this loss of three-quarters of a cent, added to one-quarter of a cent charged for commission, makes one cent per bushel on 1,000 bushels, or \$10. This exhausts or "freezes" out the margin, the deal is closed, and the shop has made \$10. On the other hand, should wheat advance one cent per bushel, the customer would make one cent per bushel, less one-quarter of a cent per bushel, the commission, and the shop would lose three-quarters of a cent per bushel. It is understood between the customer and the shop that there is no actual deal in grain; that there is none to be delivered; but that the difference in future prices is simply dealt in. In other words, the customer bets the shop that on a certain day in the future, or in a certain month in the future, wheat will be worth so much; and if, at the time agreed, the wheat is worth so much, the customer wins — less the commission; if it is not worth that much the shop wins. The quotations are used as a basis of this species of betting, as a gambler uses dice to decide the bet.

We are satisfied from the proof in the case that appellant was engaged in this kind of business, and that the contract with the appellee, by which appellant was furnished with the market reports, and that the use of the "ticker" was necessary to enable the appellant to carry on the business. As we have just said, in this kind of business nothing is actually bought or sold; nor do the parties intend an actual sale of the commodity which they pretend to deal in. They merely wager on the market price of the commodity at some specific time in the future. A mere

statement of the character of business done by appellant shows it to be a species of gambling, as well defined and as reprehensible as that of keeping a faro bank or a dice machine, and is, therefore, illegal and contrary to public policy.

The question, then, is, can the appellee avail itself of the fact that appellant was engaged in an illegal business as an excuse for withholding the market reports from him, and withdrawing the ticker, both of which were used by appellant in carrying on said business.

Says Justice SHAW, in the case of *Fuller v. Dame*, 18 Pick. 472: "The law goes further than merely to annul contracts, where the obvious and avowed purpose is to do, or cause the doing, of unlawful acts; it avoids contracts and promises made with a view to place one under wrong influences—those which offer him a temptation to do that which may injuriously affect the rights and interests of third persons."

Justice GRIER, in the case of *Marshall v. The Baltimore & Ohio R. R. Co.*, 16 Howard, 334, says: "It is an undoubted principle of law, that it will not lend its aid to enforce a contract to do an act that is illegal, or which is inconsistent with sound morals or public policy, or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions."

In *Watson v. Fletcher*, 7 Gratt. 1, it is held that, when gaming or wagering is illegal under the statute or common law, the illegality will extend to all antecedent contracts made in aid of or to effectuate the illegal purpose.

These reports were the essence—the very sinew—of appellant's gambling business, and without the prompt supply of which his business was a failure. Can the appellee be compelled to continue the supply? We think not. Not upon the ground that the appellee is the innocent victim of an illegal enterprise; not that it has been entrapped into aiding a gambling business; for it says that it was willing to furnish the reports as long as the terms of the contract suited it, but upon the ground that appellant was

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engaged in a gambling enterprise which is contrary to law, good morals, and public policy. It is for the sake of the law, and the best interests of society, that we relieve the appellee from continuing to furnish the appellant with reports.

It is contended, that, although the appellant may be engaged in a gambling business, the appellee has no right to withhold the reports from him, because of its position as a public servant, bound to serve the public indiscriminately, and without questioning the motives or the purposes of the persons who employ it.

Mr. Gray, in his work on Communication by Telegraph, section 15, says: "The general rule is that a telegraph company is under no obligation to contract to communicate an illegal or an immoral message."

This rule is not only correct as to telegraph companies, but applies to all persons who undertake to carry for the public. A contrary rule would convert a telegraph company into a public vehicle for the purpose of communicating unlawful, treasonable, or felonious schemes of all kinds, or the consummation of any and all kinds of illegal transactions and enterprises. Of course, a telegraph company, in assuming to refuse to send a message because it is illegal or immoral, acts upon its peril. If it is mistaken or has misjudged the tenor or purpose of the message, it would be held responsible to the injured party for any damage sustained by reason of the refusal.

* * * * *

The judgment of the lower court, dissolving the injunction and dismissing the petition, is affirmed.

NOTE.—Of the foregoing five cases it may be remarked that in the first two, the *Smith* (N. Y.) and *Davis* cases, the defendants were stock-telegraph companies and were actually engaged in the business of collecting and supplying market quotations, and in the former case at least, the decision was based on the public duty to not discriminate. See *Friedman v. Gold & Stock Telegraph Co.*, 1 Am. Elec. Cas. 621.

In the next two cases, *Sterrett* and *Cain*, it was held to be no part of the public employment of the defendant, an ordinary telegraph company, to

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furnish stock quotations. See cases in General Note, 1 Am. Elec. Cas., at p. 857, "Duty to Customers and the Public."

In the Kentucky case last above reported, the decision denying the application for injunction was put upon the ground that the plaintiff was engaged in an illegal business, to wit, keeping a "bucket shop." A contrary decision upon that point was made in the *Sterrett* case.

PEOPLE, EX REL. POSTAL TELEGRAPH CABLE CO. v. HUDSON
RIVER TELEPHONE COMPANY.

N. Y. Supreme Court, Albany Special Term, May, 1887.

(19 Abbott's New Cases, 466.)

TELEPHONE COMPANY.—DISCRIMINATION.—RULES AND REGULATIONS.—
MANDAMUS.

▲ telephone company is bound to furnish its instruments and facilities to all persons willing to accede to its terms and to obey its reasonable regulations; and under this rule mandamus granted compelling such a company to place a telephone in the office of a telegraph company.

▲ regulation of a telephone company forbidding the use of its instruments for messages in respect to which toll is to be paid to any other party than the telephone company, held reasonable at common law and not forbidden by statute in New York.

▲ regulation forbidding the use of telephones to call messengers, except those in the employ of the telephone company, held unreasonable and void.

Cases of this series cited in opinion: *State ex rel. Am. Un. Tel. Co. v. Bell Teleph. Co.*, vol. 1, p. 299; *Louisville Transfer Co. v. Am. Dist. Tel. Co.*, vol. 1, p. 305, note.

APPLICATION for peremptory mandamus. The facts appear in the opinion.

Nathaniel C. Moak (*Martin D. Conway*, attorney), for the relator.

D. Cady Herrick, for the defendant.

PARKER, J.: The relator is engaged in the transmission of messages by telegraph; the defendant, in the transmission of human speech by means of the telephone. In addition, both relator and defendant carry on a general messenger business in the city of Albany, and each is duly organized under and by virtue of statutes of this State.

By the moving papers it appears that the relator demanded of the defendant that one of its telephones be placed in the office of The Postal Telegraph Cable Company, and at the same time offered to pay any sum required for the privilege of having and using such telephone, and further promised to "comply with all the rules and regulations, regulating and controlling all persons, corporations and companies having or using said telephone," and that the defendant refused, and still refuses, to comply with such demand.

Thereupon the relator moved the court for peremptory mandamus, directing the defendant, on payment to it, by relator, of its usual charges and compliance with its proper regulations, to place one of its telephones in relator's office.

The owner of a patent has the right to determine whether or not any use shall be made of his invention, and, if any, what such use shall be. When, however, he determines upon its use, his legal duty to the public requires that all persons shall, in respect to it, be treated alike, without injurious discrimination as to rates or conditions. A common carrier is bound to carry all articles within the line of its business, for all persons upon the terms usually imposed, *Bank v. Adams Express Co.*, 1 Flippin (S. C.), 242. When a railroad company establishes commutation rates for a given locality, it has no right to refuse to sell a commutation ticket to a particular individual of such locality. *Atwater v. Delaware & Lackawanna R. R.* 4, East. Rep. 186. A gas company must furnish gas at the same rates to all consumers who apply and are ready and willing to pay therefor. *Shepard v. Milwaukee*, 6 Wis. 539; *People, ex rel. Kennedy v. Manhattan Gas Co.*, 45 Barb. 136. And a telephone company is not permitted to withhold

facilities for the transaction of business from one class of citizens which it accords to others. *State, ex rel. American U. T. Co. v. Bell T. Co.*, 11 Cent. L. J. 359.

The authorities cited establish the principle that a public servant, as the defendant is, cannot so use the invention protected by the government, as to withhold from one citizen the advantages which it accords to another; and it follows that the relator in this case, on compliance with the usual terms, and reasonable regulations of the defendant, is entitled to have mandamus issue directing the placing of one of its telephones in relator's office.

The defendant's papers contain a copy of the agreement which it requires its subscribers to sign before giving to them a telephone for use, such agreement containing the rules and regulations which the defendant has determined must form a condition precedent to the placing or using of one of its telephones.

Upon the argument, relator's counsel contended that a portion thereof was unreasonable, and that to comply therewith would substantially deprive his client from receiving any benefit to its business by the use of the telephone.

The clauses in the agreement to which objection was made were: First. "They are not to be used for....any part of the work of collecting, transmitting or delivering any message in respect of which any toll has been or is to be paid to any party other than the Exchange.* Second. Nor for calling messengers except from the central office."

As to the first: Both parties are engaged in the attempt to extend their business to the utmost possible limit. They are alike interested in securing as many customers as possible for their respective lines, and to a considerable extent they are competitors in the same territory for the business of transmitting messages.

Now, while the rule is well settled that a common carrier must serve the public impartially, still it must be borne in mind that its duty is to the public, and not to other and

* The telephone company.

competing common carriers. One common carrier cannot demand, as a right, that it be permitted to use a rival common carrier's property for the benefit of its own business. *Express Cases*, 117 U. S. 1; *Jencks v. Coleman*, 2 Sumner, 221; *Barry v. O. B. H. Steamboat Co.*, 67 N. Y. 301.

The relator in this case, however, contends that the statute under which the defendant was incorporated, makes it the duty of the defendant to permit such use of its telephone as the relator's business requires.

The statute, among other things, provides that "it shall be the duty of the owner or the association owning any telegraph line doing business within this State, to receive dispatches from and for other telegraph lines and associations and from and for any individual, and on payment of their usual charges for individuals, for transmitting dispatches, as established by the rules and regulations of such telegraph line, to transmit the same with impartiality and good faith."*

It is clear that the provision quoted makes it the duty of the defendant to transmit over its wires any and all messages which the relator may desire to have transmitted, on payment of their usual charges to individuals. It seems equally clear that it was not intended to, and does not authorize the relator to transmit its own messages over defendant's wires, on payment of the merely nominal sum required of its ordinary subscribers.

Such a rule would result unjustly to the defendant, as it would enable the relator to enter into competition with defendant in the transmission of messages over its own wires. With equal propriety it could demand that it be connected with the wires of the Western Union Telegraph Company, on payment of a proper charge, and that then it be permitted to use in its own way, and at its own convenience, the wires and property of its competitor for its business.

* L. 1845, c. 265, § 11, as amended by L. 1855, c. 559; same stat. 2 R. S. (7 ed.) 1719.

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* L. 1845, c. 265, § 11, as amended by L. 1855, c. 559; same stat. 2 R. S. (7 ed.) 1719.

Such a construction as the relator contends for is not in accordance with either the letter or spirit of the statute. What the statute commands of corporations doing business in this State is, that they shall send any message presented by another telegraph company, for that purpose, on payment of the proper and usual charges. Should defendant refuse at any time to send a message presented by the relator for that purpose, the law affords an adequate remedy for the violation of the statute. No claim is made that the defendant has ever refused to send messages for the relator, and the only question in respect to the transmission of messages in controversy here is: Can the relator demand the right to transmit them according to its own pleasure? Neither the rules established by the courts nor the statute referred to justify such a holding, and in that respect, therefore, the rules and regulations of the defendant seem to be reasonable and proper.

The objection that so much of defendant's regulations as prevents the use of the telephone by a subscriber for the purpose of calling messengers except from the central office, is unreasonable, seems to me to be well taken. The defendant urges that the messenger business as conducted by it is profitable, and for that reason it is desirable that it should be retained as free from competition as possible; and in aid of its position invokes the rule as established by the courts, that it owes no such duty to its rival as the permission to use its property for the purpose of a competing business would constitute. The rule cannot be questioned, but the application is faulty. The messenger business, although carried on by the same company and at the same offices, is nevertheless a distinct and separate business, and in no wise essential to the conduct of the defendant's system of transmitting messages by telephone, for which purpose it was incorporated. To extend the rule protecting its business from rivals, so as to include any other business in which it might see fit to engage, could result in great injustice to the public. A livery stable, provision store, meat market, and other classes of

business could be added in the course of time, and by amending their rules so as to include each new business in the same manner as the messenger service is now attempted to be protected, a monopoly could be created at the expense of tradesmen and merchants, and to the detriment of the public generally.

In *Louisville Transfer Co. v. Am. Dist. Tel. Co.*, 24 Alb. L. J. 283-4, both parties were engaged in the carriage and coupé service, and the defendant insisted upon the right to a monopoly in the use of its own telephone methods of communicating and receiving orders for coupés. The court held otherwise, and granted an injunction restraining defendant from removing the telephone, and from refusing to transact plaintiff's business. The decision of the court in that case is applicable to the question here involved and its reasoning is approved.

It follows: First. That the relator is entitled to a mandamus directing and commanding the defendant to place a telephone in its office on compliance with defendant's rules and regulations, and payment by it of defendant's proper charges.

Second. That so much of defendant's regulations as provide that the telephone shall not be used "for calling messengers except from the central office," are unreasonable, and need not be acceded to by the relator.

Third. As it was stated upon the argument that a review of the decision was intended, an application for a stay under section 2089 (Code Civ. Pro.) will be entertained.

Order to be settled on four days' notice by either party.

NOTE.—See *State of Nebraska, ex rel. Webster v. Nebraska Teleph. Co.*, 1 Am. Elec. Cas. p. 700; *Louisville Transfer Co. v. Am. Dist. Teleph. Co.*, id., p. 305, note.

Telegraph Co. v. Commonwealth, ex rel. Friend.

CENTRAL DISTRICT AND PRINTING TELEGRAPH COMPANY
v. COMMONWEALTH, EX REL. FRIEND & CO.

Pennsylvania Supreme Court, Jan. 3, 1887.

(114 Pa. St. 292.)

TELEPHONE COMPANY.—DUTY TO THE PUBLIC.—MANDAMUS.

Answer to a writ of mandamus directed to a telephone company, to compel it to furnish instruments to the plaintiff, held sufficient to meet the requirement of "certainty to a common intent."

ERROR to Common Pleas, No. 2, Allegheny county. Petition for alternative mandamus. Appeal from judgment for relator on demurrer.

John Dalzell, for plaintiff in error.

W. Bakewell, for defendant in error.

Mr. Justice GORDON delivered the opinion of the court: The case submitted to us is founded on a petition by J. W. Friend & Co., praying for a writ of mandamus against the Central District & Printing Telegraph Company. On the twenty-seventh day of February, 1886, a rule was granted on the defendant to show cause why the writ sued for should not issue. This rule having been duly served, and no answer having been made thereto, on March 20th, the court awarded an alternative mandamus, returnable on the 10th of April then next. To this writ an answer was filed, to which the relators demurred, and on that demurrer the court, after hearing the parties by their counsel, entered judgment against the defendant. We have, then, this demurrer for consideration, to the disposition of which by the court below the plaintiff in error has excepted. The court

necessarily founded its judgment on the insufficiency of the answer ; but, as in considering a demurrer, regard must be had to all the pleadings, and not merely to that part of them to which the demurrer refers, we must, in order to reach a correct result, review the writ, which, of course, follows the petition.

From an examination of this writ, we gather the following facts : That the business of the relators is the manufacture of iron and steel, their place of business being at the corner of Steuben and Carson streets, on the south side of the Monongahela river, in Pittsburgh. That the defendant is a Pennsylvania corporation, engaged in the business of operating telephone lines *inter alia*, in the said city and its vicinity ; that it has the exclusive right to sell to others the use of telephones within the limits above stated, and that its office is at the corner of Fifth avenue and Wood street. That the respondent undertakes and publicly offers to furnish telephone instruments to all classes of persons who will become subscribers to their telephone exchange, and agree in writing to pay an annual rental therefor, and comply with certain terms prescribed by the said company for the use of its instruments.

That the relators applied to the respondent for a telephone, to be put up in their mill, at the corner of Steuben and Carson streets, and offered to pay therefor an annual rent of \$84, which, it is alleged, is the rent usually charged to its subscribers, they agreeing to pay, in addition to the sum stated, the charge which the Point Bridge Company might impose for the use of its structure in carrying the telephone wire across the river ; and that the respondent had refused to furnish an instrument at that rate, but demanded a rental of \$150, which, it is further alleged, is largely in excess of the rent charged by said company to other firms, and individuals, at points within the city of Pittsburgh, distance as far as, and farther from the central office than the office of the relators. It may be admitted that all that is essentially necessary to maintain the writ of mandamus is found in the above statement ; that is, that a

definite legal right exists in the relators to have the telephone service, and a consequent duty on part of the company to furnish it.

There is, also, in this statement of facts, on which the right is made to depend, certainty to a common intent; that is, they are stated with a precision sufficient to express the right of the one, and the duty of the other, in such manner that the ordinary mind, disregarding technicality of pleadings, may easily apprehend them. So, also, as the want of a specific legal remedy is made to appear from the same source, we may concede that there is enough in the petition to warrant the alternative writ. But, on the principles above stated, we are at a loss to discover why the answer was not sufficient. Certainty to a common intent is the rule, and that applies as well to the answer as to the petition, and it is sufficient that the former, without ambiguity or evasion, responds to and denies the assertions of the latter. *Commonwealth v. The Commissioners of Allegheny County*, 32 P. S. R. 218. The material allegation, as found in the petition, seems to be, that a tender of \$84 per annum, the usual price charged to others, whose places of business were as far from the company's office, or exchange, as that of the relators, was made to the company, and that tender was refused, and a rental of \$150 a year was demanded. To this the respondents answered: (1) denying that it charges to all its subscribers an annual rental of \$84, and averring that it charges various sums depending upon the service rendered, the distance from the central office, and the cost of erection and maintenance; (2) replying to paragraphs 7, 8, 9, 10 and 11 of the petition, that the rent of \$84 only applies to those telephones within a radius of one-half mile from the central office; and that the rate fixed for telephones at the same distance as that of the petitioners — that is to say, within a radius of one and one-half miles from the central office — is \$150, and that the respondent has always been willing and has offered to rent a telephone to the petitioners at that price. Surely, if this answer is not sufficiently definite, it is not because it does

not fully answer the allegations contained in the writ, but rather because the writ itself is not sufficiently specific.

We think, however, both are as perspicuous as the case requires: the petition, in alleging the default of the company in refusing to them the use of its telephones on tender of the usual rent; the answer, in denying that the sum stated was the usual rent for the service required, and averring that, for the price usually charged to others at a like distance as that of the relators from the central office, it was ready and willing to furnish the required apparatus; It is true, the counsel for the plaintiffs profess, as did the court below, to see an evasion in the denial of the company that it charged *all* its subscribers \$84 per annum, as though from this it might be inferred that there were *some* of its subscribers, within the same radius, that were charged less than others. But no one, having regard to the language of the answer, can reasonably come to any such conclusion, for it contains the explanation that the rent of \$84 applies only to telephones within one-half mile of the central office.

The other exceptions are no better founded than the one above stated, and their very technicality and immateriality show the strain that was upon the acute and learned counsel to discover, or devise, faults in an instrument which plainly and positively meets and contradicts the averments of the petition.

Judgment reversed, and a procedendo awarded.

State, ex rel. Telegraph Co. v. Telephone Co.

STATE OF MISSOURI, EX REL. BALTIMORE & OHIO TELE-
GRAPH COMPANY, v. THE BELL TELEPHONE COMPANY.

U. S. Circuit Court, Eastern District of Missouri, March 31, 1885.

(23 Fed. R. 539.)

TELEPHONE COMPANY.—DISCRIMINATION BY CONTRACT.—MANDAMUS.

A local telephone company cannot legally contract with the parent company under whose license it operates, to discriminate as between two telegraph companies, furnishing instruments and service to one and refusing it to the other.

In a proceeding for mandamus, based on such refusal, the licensor is not a necessary party.

APPLICATION for *mandamus*.

Garland Pollard, for petitioner.

E. T. Allen, for defendant.

BREWER, J. (*orally*): In this case, I regret to say that my brother TREAT and myself do not agree fully as to the rights of the parties. It is an application on the part of the Baltimore & Ohio Telegraph Company to compel the Bell Telephone Company of Missouri—the company having the telephone business of this city—to permit telephonic communication between it and the petitioner, the Baltimore & Ohio Telegraph Company. The defendant answers that it is engaged in the telephonic business here by virtue of a license obtained from the American Bell Telephone Company, a Massachusetts corporation; that by the terms of the license under which it does business, it may not establish telephonic connections with any telegraph company, other than that permitted by the licensor—the holder of the patent—the Massachusetts

company; and it further appears that such licensor has permitted telephonic communication with the Western Union Telegraph Company.

Now, the question is whether the court can compel this defendant, doing the telephonic business of this city, to establish communication with any other individual, or company, than that permitted by its license from the patentee. I believe fully in the sacredness of property; but I think all property stands upon an equal basis, whether that property consists of gold dollars in your pocket, real estate, or the ownership of a patent. There is no peculiar sanctity hovering over or attaching to the ownership of a patent. It is simply a property right, to be protected as such. Starting from that as a basis, while every property owner may determine for himself to what he will devote his property, yet the moment he puts that property into what I perhaps may, for lack of a better expression, define as the channels of commerce, that moment he subjects that property to the laws which control commercial transactions; just as in the warehouse cases (*Munn v. State of Illinois*, decided by the Supreme Court of the United States, and reported in 94 U. S. 113,) in which that court held that when an individual built a warehouse, and put his property into that kind of business, he subjected the property thus placed to the laws which controlled the transactions of commerce, involved in which was the power of the public, through the Legislature, to regulate rates. No man holding property was bound to build a warehouse, or bound to put his property into that particular channel, but the moment he did so, he put it where the Legislature could say, "You may charge so much, and no more, for the transaction of this business." He puts his property into the channels of commerce—as multitudes are doing—into the railroad business, into the express business, and into other channels of commerce. Whenever the property is put into those channels, it is put within the power of the public, speaking through its Legislature, or the power of the court enunciating general rules operative upon such transactions,

to modify leases, modify licenses, control duties. So, notwithstanding this licenser has given to the licensee the right to establish a telephonic system in the city of St. Louis, with telephonic communication with only certain prescribed telegraph systems, the moment it permitted the establishment of a telephonic system here, that moment it put such telephonic system within the control of the State of Missouri, and the control of the courts, enforcing the obligations of a common carrier.

A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all. It may not say to the lawyers of St. Louis, "my license is to establish a telephonic system open to the doctors and the merchants, but shutting out you gentlemen of the bar." The moment it establishes a telephonic system here, it is bound to deal equally with all citizens in every department of the business; and the moment it opened its telephonic system to one telegraph company, that moment it put itself in a position where it was bound to open its system to any other telegraph company tendering equal pay for equal service.

So, my conclusion is that, notwithstanding the terms of this license, which seems to inhibit it from dealing or giving its telephonic privileges to any other telegraph company than the Western Union, the moment it established its telephonic system here, that moment it compelled itself to respond to the demands of any telegraph company or any individual in the city tendering to it equal pay for equal privileges.

The application for *mandamus* will be sustained.

My Brother TREAT differs, however, from me, and may desire to express his difference of views.

NOTE.—TREAT, J., dissented upon the ground that the licensee, sole defendant, could not be compelled by *mandamus* to do that which its contract of license forbade it to do. He distinguished the case at bar from the Ohio case (*State of Ohio, ex rel. Am. Un. Tel. Co. et al. v. The Bell*

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Teleph. Co. et al., 1 Am. Elec. Cas. 299), in that the licensor company was there a party defendant, and likened it to the Connecticut case (*Am. Rapid Tel. Co. v. Conn. Teleph. Co.*, 1 Am. Elec. Cas. 299).

"Suffice it to say, in my judgment there is no authority for courts to compel a man to do what he has no right to do, and force him to violate his contract. He stands on his contract as he has made it, and there end his duties, obligations and rights, and courts cannot cause him to violate it. That is my view of the case. Parties must pursue the American Bell Telephone Company if they wish this question to be presented; it cannot arise in this way."

After the case had been somewhat further discussed from the bench, the court, at the suggestion of counsel for defendant, stated that a division of opinion would be noted, so that the case might be advanced to the Supreme Court. It seems, however, never to have been decided there.

On account of the division of the court, a memorandum only of this case was made in vol. 1 (p. 857); but as it has been often cited, it has been thought best to report the case here.

See note to *Com. Un. Teleph. Co. v. N. E. Teleph. and Tel. Co.*, post.

BELL TELEPHONE COMPANY OF PHILADELPHIA V. COMMONWEALTH, EX REL. BALTIMORE & OHIO TELEGRAPH COMPANY.

Pennsylvania Supreme Court, April 19, 1886.

(17 Weekly Notes of Cases, 505.)

· TELEPHONE COMPANY.— CONTRACT FOR DISCRIMINATION.— MANDAMUS.

A telephone company cannot discriminate against a telegraph company requiring its instruments and service, although such discrimination is required by its license from a foreign corporation owning the patented devices which it uses.

The word "telegraph" in a statute includes "telephone."

Cases of this series cited in opinion: *Att'y-Genl. v. Edison Teleph. Co.*, post; *State of Ohio, ex rel. Am. Un. Tel. Co. v. Bell Teleph. Co. et al.*, vol. 1, p. 299; *State of Missouri, ex rel. Am. Un. Tel. Co. v. Bell Teleph. Co. of Mo.*, vol. 1, p. 304, note; *State of Missouri, ex rel. B. & O. Teleph. Co. v. Bell Teleph. Co. of Mo.*, ante, p. 404; *Am. Tapid Tel. Co. v. Connecticut Teleph. Co.*, vol. 1, p. 390; *Louisville Transfer Co. v. Am. Dist. Tel. Co.*, vol. 1, p. 305, note.

Telephone Co. v. Commonwealth, ex rel. Telegraph Co.

ERROR to Common Pleas No. 4, of Philadelphia county, to review a judgment sustaining the relator's demurrer to the respondent's return to an alternative writ of mandamus and awarding a peremptory writ, directing the respondent to furnish telephone facilities to the relator at its office, for its ordinary business and the delivery and reception of telegraphic messages. Further facts appear in the following opinion of the court below, deciding the demurrer.

ARNOLD, J.: The relator and respondent are Pennsylvania corporations, organized under the Corporation Act of 1874. The relator operates lines of telegraph, the respondent operates lines for the transmission of human speech by means of the telephone. It is averred by the relator and admitted by the respondent, that the use of the telephone is a public necessity which no other human agency can supply. Consequently the telephone business is a public business. It is also averred that the respondent undertakes to serve the people of Philadelphia, without distinction of class or occupation, at an annual rental which is uniform to all classes; that the relator, the Baltimore and Ohio Telegraph Company, has applied to the respondent for a telephone instrument and necessary connecting wires, and has offered to pay the usual rental therefor, and to comply with all the reasonable rules and regulations of the respondent; but that the respondent refuses to furnish to the relator a telephone for the purpose of receiving or delivering telegraph messages, although such service is simply in the ordinary line of the relator's business. To show that this refusal is an unjust and unreasonable discrimination against the Baltimore and Ohio Telegraph Company, it is averred that the respondent has placed an instrument in the office of the Western Union Telegraph Company, in the city of Philadelphia, and permits that company and its customers to use the telephone for the purpose of sending telegrams; and it is alleged that the permission thus enjoyed by the Western Union Telegraph Company, and the refusal to permit the Baltimore and Ohio Telegraph Company and its customers to enjoy the same privileges, is an unjust discrim-

ination against them, and a violation of the duty of the respondent to serve the public indiscriminately.

The respondent, the Bell Telephone Company of Philadelphia, alleges that it is the licensee of the National Bell Telephone Company, to whose rights the American Bell Telephone Company has succeeded; and that the respondent is subject in its dealings with the people of Philadelphia to the terms of the contract under which license was given; that the American Bell Telephone Company is now the owner of all the patents for the transmission of articulate speech by means of electricity; that there were at one time numerous suits pending between the National Bell Telephone Company and other parties in its interest, and the Western Union Telegraph Company and parties in its interest, involving conflicting claims to priority of invention and alleged infringement; and that in the year 1879 it was agreed, in settlement of the litigation, that the National Bell Telephone Company should acquire all the patents relating to telephones, but that the telephones, in the words of the agreement, "are not to be used for the transmission of general business messages, market quotations, or news for sale or publication in competition with the business of the Western Union Telegraph Company or with that of the Gold and Stock Telegraph Company; and the party of the second part (the National Bell Telephone Company), so far as it lawfully and properly can prevent it, will not permit the transmission of such general business messages, market quotations, or news for sale or publication over lines owned by it or by corporations in which it owns a controlling interest, nor license the use of its telephones or patents for the transmission of such general business messages, market quotations, or news for sale or publication in competition with such telegraph business of the Western Union Telegraph Company or that of the Gold and Stock Telegraph Company.

"The party of the second part will fully license the party of the first part (the Western Union Telegraph Company) to use telephones procured from it for transmitting telegraph messages," etc.

“For the purpose and uses aforesaid, the party of the first part shall be furnished with telephones, with *licenses* from the party of the second part, to use such telephones and other inventions owned or controlled by it, for use in connection with telephone lines on terms which may be established from time to time, and which shall be as favorable as those on which they are furnished to any other parties for like uses, and shall be allowed a discount as provided in article 2.”

I have quoted literally from the agreement of 1879 for the purpose of showing that the Western Union Telegraph Company is not a patentee which has granted a license for a restricted use of its patents to the telephone company, reserving thereout a certain exclusive use to itself, as was contended on its behalf by the learned and able counsel of the respondent; but that it is a licensee, paying to its licensor, as averred in the return, an additional compensation or royalty upon every message received or delivered by it, of which compensation or royalty only a small percentage is paid to the respondent, according to its averment. The agreement, it will be seen, provides for licenses from the telephone company, to the Western Union Telegraph Company, on terms to be established from time to time, which shall be as favorable to that telegraph company as to any other parties for like uses, thereby recognizing the duty of the respondent and its licensor to deal equally with all, and binding it to that duty by express contract. All the telephone patents, it is claimed for the respondent, are now owned by the American Bell Telephone Company; and no person can use them except under contracts or licenses from that company. The Western Union Telegraph Company has given up its claims to all such patents, and the American Bell Telephone Company has put them into public use, and thereby subjected them to the rule that when the use of a patented device is thrown open to the public, or to classes of the public, all are entitled to use it on the same terms as other persons in the same class. The rules which govern common carriers apply to it, and those

rules prohibit any discrimination to be made. This is the rule of the common law as enforced in many adjudged cases, of which *Sandford v. The Railroad Company*, 24 Pa. St. R. 378, may be referred to as a conspicuous and pertinent example. In that case it was decided that a contract giving to one express company an exclusive right of transportation in the passenger trains of the railroad company is illegal and void. The law on this subject is placed beyond successful dispute by the third clause of section 33 of the Corporation Act of 1874, which enacts that "the said telegraphic corporations shall * * * receive dispatches from and for other telegraph lines and corporations, and from and for any individual; and on payment of their usual charges to individuals for transmitting dispatches, as established by the rules and regulations of such telegraph line, transmit the same with impartiality and good faith, under penalty of one hundred dollars for every neglect or refusal so to do," etc. And that telephone companies are included within this clause is shown by the case of *The Attorney-General v. The Edison Telephone Co.* of London, reported in the Law Reports, 6 Queen's Bench Div. 244 (A. D. 1880), in which English statutes relating to telegraph companies enacted in the years 1863 and 1869, before the telephone was patented or perhaps invented, were held to apply to telephone companies. Besides, the respondent was chartered under the act of 1874, which gave it a legal existence and prescribed its duty at the same time. It cannot transact business in this State but for that act, and, operating under that act, it must deal equally with all, with impartiality and good faith, and without discrimination in favor of or against anyone.

The conclusion to which we have come by the foregoing reasoning is supported by the authority of several adjudged cases.

In the case of the *State of Ohio, on the relation of The American Union Telegraph Company and The Baltimore and Ohio Railroad Company v. The Bell Telephone Company, The Columbus Telephone Company*

and The Western Union Telegraph Company, reported in the 36th Ohio State Reports, at page 296 (A. D. 1880), an application was made to the Supreme Court of Ohio for a mandamus to compel the Columbus Telephone Company to place a telephone in the office of the relators for the use of their telegraphic department. The (American) Bell Telephone Company, although a party, does not appear to have been served, nor did it join in the answer filed. The defense was, that the license by the American to the Columbus Telephone Company contained the same restriction which is in controversy in this suit, that the Columbus Telephone Company would not permit the transmission of general business messages, market quotations or news for sale or publication, and that it would turn over all such messages to the licensor, the American Bell Telephone Company, unless otherwise directed by its customers, but that it would not solicit such directions, nor receive pay for transmission over other lines, unless compelled by law to do so, thereby showing the doubt of the parties to the contract as to its validity. There is in Ohio a statute similar to our Pennsylvania statute, requiring telegraph companies to receive despatches from and for other companies and individuals, and to transmit the same with impartiality on payment of the usual charges. The court held that the contract to the effect that discriminations should be made between telegraph companies is void as against public policy, as declared by the statute, and awarded the mandamus.

In the case of the *State of Missouri, ex relatione the American Union Telegraph Co. v. The Bell Telephone Company of Missouri*, in the Circuit Court of St. Louis, reported in the 10th Central L. J. 438, and 11th Id. 359, also in the 22nd Albany L. J. 363 (A. D. 1880), there were clauses in the license of the respondent which provided that its patrons should not use the telephone for transmitting messages for which toll is paid to anyone but the respondent, nor for transmitting market quotations or news for sale or publication; that it should not connect any of

its offices with any telegraph office or line, and that no telegraph company should be allowed to become a subscriber. Judge THAYER held that this second clause would compel the respondent to discriminate against a class of individuals or corporations, which is contrary to law and public policy. A public servant cannot avoid the performance of any part of the duty it owes to the entire public, by a contract even with the patentee of an invention. Doubtless a condition limiting the use which should be made of the telephone, affecting all classes of citizens, and discriminating between none, might be valid ; but having the right to use the telephone, the relator might use it for the same purposes that other subscribers use it.

The principle was also enforced in the case of the *Louisville Transfer Co. v. American District Telephone Co.*, in the Louisville Chancery Court, reported in 14 Chicago Legal News, p. 15, and also in 24 Albany L. J. 283 (A. D. 1881). In that case the plaintiff carried on a passenger transfer business in public omnibuses and carriages, and the defendant operated a telephone exchange, and organized as a part of its business a system of public transfer by carriages and coupés. The defendant had placed a telephone in the plaintiff's office, and threatened to remove it ; whereupon the plaintiff applied for an injunction. Chancellor EDWARDS held that the defendant, being engaged in two distinct employments, one the operating of a telephone exchange and the other a carriage service, there was no rivalry between the plaintiff and defendant in the telephone business, as to which the defendant occupied the same position towards the plaintiff as towards the rest of the public, and the defendant, being a *quasi* public servant, is bound to serve all alike and impartially on the principles of the law of common carriers.

The last reported case in which the same conclusion was reached is that of the *State of Missouri, ex rel. Baltimore & Ohio Telegraph Co. v. Bell Telephone Co. of Missouri*, in the Circuit Court of the United States for the Eastern District of Missouri, reported in 24 L. Reg., page

573, and in the 8 Amer. & Eng. Corp. Cases, page 7 (A. D. 1885). It will be noticed that the plaintiff in that case is the plaintiff in the case now before us, and the defendant was in the same position as the defendant in this case, and it rested its defense on the same ground — a contract with the American Bell Telephone Company, that it would not establish telephonic connection with any telegraph company, unless permitted by the American Bell Telephone Company. It also appeared that telephonic communication had been permitted to the Western Union Telegraph Company. Judge BREWER held that the telephone company having put its patents into public use, or the channel of commerce, as he expresses it, the property is put within the power of the court for enforcing the obligations of a common carrier. It is true the judgment was given by a divided court, but Judge TREAT placed his dissent on the ground that the American Bell Telephone Company not being a party, in his opinion, a valid judgment could not be given.

The Supreme Court of Connecticut has decided the question the other way, notwithstanding there is a statute in that State and also in Massachusetts, similar to those of Ohio and Pennsylvania. *American Rapid Telegraph Co. v. Connecticut Telephone Co.*, 49 Conn. 352 (A. D. 1881).

In the case before us the American Bell Telephone Company is not a party, and we do not think it indispensable that it should be. We are not called upon to expound or enforce the contract between that company and the Philadelphia company. What we are called upon to do is to declare that the illegal portions of their contract cannot be enforced in this State; that those portions are void and against public policy as declared both by the common law and by statute; and that the respondent cannot shield itself from the performance of its duty to serve the public impartially and without discrimination by a contract with a party not within the State. We deal with parties carrying on a public business within our borders, under the protection

of our laws, to compel them to comply with our laws. They cannot obtain immunity from their obligation to treat all alike by pleading a license from parties beyond our grasp. The owner of a patent may put it in public use or withhold it as he chooses; but if he does put it in public use, then, as was well said by Chief Justice McILVAINE, of Ohio: "The manner of its use may be controlled and regulated by State laws when the public welfare requires it." The patent gives him a monopoly by protecting him from the competition of other persons in the business secured by the patent; but it does not permit him to make discriminations against persons who are willing to pay the same rates which other persons are charged for the use of it.

We say nothing now on the subject of charges by the respondent for the use of the telephone except this: whether it be by an annual rental or a tariff of charges upon messages, it must be the same for all.

The demurrer is sustained and a writ of peremptory mandamus awarded.

Silas W. Pettit, John R. Reid, Samuel B. Huey and Wager Swayne, for plaintiff in error.

N. Dubois Miller, for defendant in error.

The COURT: We have carefully examined the record in this case, and have given due consideration to the able argument of the counsel for the plaintiff in error, yet we are not able to discover any error in the conclusion at which the learned judge arrived. His opinion contains a correct statement of the law and vindicates the judgment.

Judgment affirmed.

PER CURIAM.

NOTE.—This case is cited in the following cases in this volume: *Chesapeake & Potomac Teleph. Co. v. B. & O. Tel. Co.*, *post*; *Central Union Teleph. Co. v. State, ex rel. Falley*, *ante*, p. 27; *Commercial Union Tel. Co. v. N. E. Teleph. & Tel. Co.*, *post*.

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The case of *Attorney-General v. Edison Teleph. Co.*, cited in opinion, may be found in note to *Franklin v. Northwestern Teleph. Co.*, post.

See note to *Commercial Union Tel. Co. v. N. E. Teleph. & Tel. Co.*, post.

THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF
BALTIMORE CITY v. THE BALTIMORE & OHIO TELEGRAPH
COMPANY OF BALTIMORE CITY.

Maryland Court of Appeals, Jan. 5, 1887.

(66 Md. 399.)

TELEPHONE COMPANIES.—DISCRIMINATION.—MANDAMUS.

The definition of the term "telegraph," to wit, "any apparatus or adjustment of instruments for transmitting messages or other communications by means of electric currents and signals," is broad enough to embrace the telephone.

A telephone company cannot by a contract with its licensor, the owner of its telephones, become excused from obeying a statute forbidding discrimination as between telegraph companies.

Cases of this series cited in opinion: *Hockett v. State*, ante, p. 1; *State of Ohio, ex rel. &c. v. Bell Teleph. Co.*, vol. 1, p. 299; *American Rapid Tel. Co. v. Conn. Teleph. Co.*, vol. 1, p. 390; *Bell Telephone Co. v. Commonwealth*, ante, p. 407; *Attorney-Genl. v. Edison*, post, p. 438, note.

APPEAL from order of Superior Court of Baltimore granting a mandamus to compel a telephone company to furnish instruments to a telegraph company. The facts are stated in the opinion.

Charles J. M. Gwinn and *Wager Swayne*, for the appellant.

E. J. D. Cross and *John K. Cowen*, for the appellee.

ALVEY, C. J., delivered the opinion of the court:

This was an application by the appellee, a telegraph company, to the court below for a mandamus, which was

accordingly ordered, against the appellant, another telegraph company, but doing a general telephone business.

Both the appellant and appellee are corporations formed under the general incorporation law of this State (act 1868, ch. 471), and both are organized "for constructing, owning, leasing, and operating telegraph lines within this State, or from or to any point or points within this State, or upon the boundaries thereof." The appellee was incorporated on the seventh day of January, 1882, by the name of the Baltimore & Ohio Telegraph Company of Baltimore City, and the appellant was incorporated on the tenth day of March, 1884, by the name of the Chesapeake & Potomac Telephone Company of Baltimore City. The principal offices of both companies are in Baltimore city; the appellee doing a large and extensive general telegraph business, and the appellant doing a general telephone business.

Section 133 of the General Incorporation Law declares that:

"Any person, association or corporation, owning any telegraph line doing business within the State, shall receive dispatches from and for other telegraph lines, associations and companies, and from and for any individual, and shall transmit such dispatches in the manner established by the rules and regulations of such telegraph lines, and in the order in which they are received, with impartiality and good faith, under the penalty of one hundred dollars for every neglect or refusal so to do, to be recovered, with costs of suit, in the name and for the benefit of the person or persons sending or desiring to send such dispatch; provided, however, that arrangements may be made with the proprietors or publishers of newspapers for transmission of intelligence of general and public interest, for the purpose of publication, out of its order."

And by the amendatory act of 1884, ch. 360, the general incorporation law is made in terms to confer authority to form corporations to construct, own or operate telephone as well as telegraph lines; and by the same amendatory act it is provided that the several sections of the general incorporation law relating to telegraph companies "shall likewise apply to and have full force and effect in respect to

ERROR to Common Pleas No. 4, of Philadelphia county, to review a judgment sustaining the relator's demurrer to the respondent's return to an alternative writ of mandamus and awarding a peremptory writ, directing the respondent to furnish telephone facilities to the relator at its office, for its ordinary business and the delivery and reception of telegraphic messages. Further facts appear in the following opinion of the court below, deciding the demurrer.

ARNOLD, J.: The relator and respondent are Pennsylvania corporations, organized under the Corporation Act of 1874. The relator operates lines of telegraph, the respondent operates lines for the transmission of human speech by means of the telephone. It is averred by the relator and admitted by the respondent, that the use of the telephone is a public necessity which no other human agency can supply. Consequently the telephone business is a public business. It is also averred that the respondent undertakes to serve the people of Philadelphia, without distinction of class or occupation, at an annual rental which is uniform to all classes; that the relator, the Baltimore and Ohio Telegraph Company, has applied to the respondent for a telephone instrument and necessary connecting wires, and has offered to pay the usual rental therefor, and to comply with all the reasonable rules and regulations of the respondent; but that the respondent refuses to furnish to the relator a telephone for the purpose of receiving or delivering telegraph messages, although such service is simply in the ordinary line of the relator's business. To show that this refusal is an unjust and unreasonable discrimination against the Baltimore and Ohio Telegraph Company, it is averred that the respondent has placed an instrument in the office of the Western Union Telegraph Company, in the city of Philadelphia, and permits that company and its customers to use the telephone for the purpose of sending telegrams; and it is alleged that the permission thus enjoyed by the Western Union Telegraph Company, and the refusal to permit the Baltimore and Ohio Telegraph Company and its customers to enjoy the same privileges, is an unjust discrim-

ination against them, and a violation of the duty of the respondent to serve the public indiscriminately.

The respondent, the Bell Telephone Company of Philadelphia, alleges that it is the licensee of the National Bell Telephone Company, to whose rights the American Bell Telephone Company has succeeded; and that the respondent is subject in its dealings with the people of Philadelphia to the terms of the contract under which license was given; that the American Bell Telephone Company is now the owner of all the patents for the transmission of articulate speech by means of electricity; that there were at one time numerous suits pending between the National Bell Telephone Company and other parties in its interest, and the Western Union Telegraph Company and parties in its interest, involving conflicting claims to priority of invention and alleged infringement; and that in the year 1879 it was agreed, in settlement of the litigation, that the National Bell Telephone Company should acquire all the patents relating to telephones, but that the telephones, in the words of the agreement, "are not to be used for the transmission of general business messages, market quotations, or news for sale or publication in competition with the business of the Western Union Telegraph Company or with that of the Gold and Stock Telegraph Company; and the party of the second part (the National Bell Telephone Company), so far as it lawfully and properly can prevent it, will not permit the transmission of such general business messages, market quotations, or news for sale or publication over lines owned by it or by corporations in which it owns a controlling interest, nor license the use of its telephones or patents for the transmission of such general business messages, market quotations, or news for sale or publication in competition with such telegraph business of the Western Union Telegraph Company or that of the Gold and Stock Telegraph Company.

"The party of the second part will fully license the party of the first part (the Western Union Telegraph Company) to use telephones procured from it for transmitting telegraph messages," etc.

several parties concerned. The contract is very elaborate, and contains a great variety of provisions. By this agreement, with certain exceptions, the National Bell Telephone Company was to acquire and become owner of all the patents relating to telephones, or patents for the transmission of articulate speech by means of electricity. But while it was expressly stipulated (art. 13, cl. 1) that the right to connect district or exchange systems, and the right to use telephones on all lines, should remain exclusively with the National Bell Telephone Company (subsequently the American Bell Telephone Company), and those licensed by it for the purpose, it was in terms provided that "such connecting and other lines are not to be used for the transmission of general business messages, market quotations, or news, for sale or publication, *in competition with the business* of the Western Union Telegraph Company, or with that of the Gold & Stock Telegraph Company. And the party of the second part [National Bell Telephone Company], *so far as it lawfully and properly can prevent it, will not permit* the transmission of such general business messages, market quotations, or news, for sale or publication, over lines owned by it, or by corporations in which it owns a controlling interest, nor license the use of its telephones or patents for the transmission of such general business messages, market quotations, or news, for sale or publication, *in competition with such telegraph business* of the Western Union Telegraph Company, or that of the Gold & Stock Telegraph Company." The contract of the twenty-third of May, 1882, under which the appellant derives its right to the use of the patented instruments, was made in subordination to the prior contract of the tenth of November, 1879, and contains a provision to conform to the restrictions and conditions just quoted. In that subordinate contract it is provided, that "no telegraph company, unless specially permitted by the licensor, can be a subscriber, or use the system to collect and deliver messages from and to its customers," etc.

These contracts are pleaded and relied on by the appel-

lant as affording a full justification for exacting from the appellee a condition in the contract of subscription to the exchange that the latter should observe the restrictions in favor of the Western Union Telegraph Company. The appellant contends that these restrictive conditions in the contracts recited are binding upon it, and that it is not at liberty to furnish to the appellee, being a telegraph company, the instruments applied for, and place them in connection with the exchange, unless it be subject to the restrictive conditions prescribed. And, if this be so, the court below was in error in ordering the mandamus to issue. But is the contention of the appellant well founded, in view of the nature of the service that it has undertaken to perform?

The appellant is in the exercise of a public employment, and has assumed the duty of serving the public while in that employment. In this case the appellant is an incorporated body. But it makes no difference whether the party owning and operating a telegraph line or a telephone exchange be a corporation or an individual, the duty imposed, in respect to the public, is the same. It is the nature of the service undertaken to be performed that creates the duty to the public, and in which the public have an interest, and not simply the body that may be invested with power. The telegraph and telephone are important instruments of commerce, and their service, as such, has become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge, than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public. They may make and establish all reasonable and proper rules and regulations for the government of their office, and those who deal with them; but they have no power to discriminate, and, while offering ready to serve some, refuse to serve others. The law requires them to be impartial, and to serve all alike, upon compliance with their

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reasonable rules and regulations. This the statute expressly requires in respect to telegraph lines, and, as we have seen, the same provision is made applicable to telephone lines and exchanges. The law declares that it shall be the duty of any person or corporation owning and operating any telegraph line within the State (which, as we have seen, includes a telephone exchange) "to receive dispatches from and for any telegraph lines, associations or companies, and from and for any individual," and to transmit the same in the manner established by the rules and regulations of the office, "and in the order in which they are received, with impartiality and good faith." And, such being the plain duty of those owning or operating telegraph lines or telephone lines and exchanges within this State, they cannot be exonerated from the performance of that duty by any conditions or restrictions imposed by contract with the owner of the invention applied in the exercise of the employment. The duty prescribed by law is paramount to that prescribed by contract.

Nor can it be any longer controverted that the Legislature of the State has full power to regulate and control, within reasonable limits at least, public employments, and property used in connection therewith. As we have said, the telegraph and telephone both being instruments in constant use in conducting the commerce and the affairs, both public and private, of the country, their operation, therefore, in doing a general business, is a public employment, and the instruments and appliances used are property devoted to public use, and in which the public have an interest. And, such being the case, the owner of the property thus devoted to public use must submit to have that use and employment regulated by public authority for the common good. This is the principle settled by the case of *Munn v. Illinois*, 94 U. S. 113, and which has been followed by subsequent cases. In the recent case of *Hockett v. State*, 105 Ind. 250, where the cases upon this subject are largely collected, it was held, applying the principle of *Munn v. Illinois*, that it was competent to the State to limit the price which

telephone companies might charge for their patented facilities afforded to their customers. And, if the price of the service can be lawfully regulated by State authority, there is no perceptible reason for denying such authority for the regulation of the service as to the parties to whom facilities should be furnished.

But, while not controverting the general principle stated, it has been strongly urged, in argument for the appellant, that the ownership of the American Bell Telephone Company of all telephone apparatus constructed by that company, or its agents, being absolute and exclusive, it had the right, in granting any license to use this apparatus, to limit such use by any conditions which it saw proper to impose upon the licensee. That in this case the licensee acquired but a limited right, and that it could impart no greater right to a subscriber to the exchange than that possessed by the licensee itself.

It is certainly true, as contended by the appellant, that the letters patent granted to Bell conferred upon him, his heirs and assigns, for a limited time, a monopoly in the invention or discovery patented, and the exclusive right to make, use, and vend the tangible property brought into existence by the application of the principle of the discovery or invention for which the patent issued. But it does not follow that those letters patent conferred upon him, or his assignees, any such exclusive right to apply or use the tangible property produced in a manner that other property could not be lawfully used. The license to use the telephone instruments in conducting and operating a telephone exchange, at once dedicated or devoted the instruments, to the extent of the requirements of that system or exchange, to public use ; and, so soon as the office of exchange was opened to the public, the instruments employed became instruments of public service, and, like all other property employed in the service, became subject to public regulation and control. And the fact that those instruments were the product of a patented invention or discovery, and the licensee had agreed to use them in serv-

ing the public, with certain restrictions inconsistent with the public regulation, can in no way, nor to any extent, relieve the party in control of the exchange from the full discharge of his duty under the law.

In the case of *Patterson v. Kentucky*, 97 U. S. 501, it was held that where, by the application of the invention or discovery for which letters patent had been granted, tangible property had come into existence, its use was, to the same extent as that of other species of property, subject to State control and regulation. In delivering the opinion of the court in that case, Mr. Justice HARLAN said: "These considerations, gathered from the former decisions of this court, would seem to justify the conclusion that the right which the patentee or his assignee possesses in the property created by the application of a patented discovery must be enjoyed subject to the complete and salutary powers, with which the States have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few. The right of property in the physical substance, which is the fruit of discovery, is altogether distinct from the right in the discovery itself, just as the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright of the map itself." The same doctrine was reiterated in the case of *Webber v. Virginia*, 103 U. S. 344, 348.

Now, applying to the case the principles stated, it would seem to be clear that there is nothing in the rights secured by the letters patent to Bell, and now held by the American Bell Telephone Company, nor in the contracts referred to, that justified the appellant in attempting to impose upon the proposed subscription to the exchange by the appellee, the restrictive conditions to which we have referred. By insisting upon such restrictive conditions there was an unjust discrimination made against the appellee, and in favor of a competing company. It was to prevent such discrimination that the law was enacted to which reference has been fully made.

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The question presented in this case, and which we have decided, has been presented and decided by other courts of the country, though not with entire unanimity.

In Ohio, under a statute very similar to our own, the question was presented in the case of *State v. The Telephone Co.*, 36 Ohio St. 296. In that case the Supreme Court held, that, under the statute requiring that telegraph companies should receive dispatches from and for other telegraph lines, and from and for individuals, and transmit them with impartiality and good faith, a contract between the telephone company and the owner of telephone instruments, providing that the company, in the use of the instruments, should discriminate as between telegraph companies, was void, and therefore could furnish no justification for the attempted discrimination.

In Connecticut, however, under a statute somewhat similar to our own and that of Ohio, a different conclusion was reached, in the case of *American Rapid Tel. Co. v. Connecticut Telephone Co.*, 49 Conn. 352. In that case the court denied the force of the statute, as applied to the owner of the patented instruments, although such instruments were licensed to be used by the local telephone company. That case was strongly pressed in the argument before us, but we have not been able to yield to its authority, though certainly entitled to great respect.

In Pennsylvania, where a statute similar to ours exists, it has been recently held by the Supreme Court of that State, in the case of *Bell Telephone Co. v. Comm., ex rel. Baltimore & Ohio Tel. Co.* (Cent. Reporter, vol. 3, No. 19, p. 907), affirming the judgment of the court below for the reason assigned by it, that the restrictive or discriminating clause in the contract of the tenth of November, 1879, was simply void as against public right. That the telephone company, holding a license for the use of patented devices, could not discriminate against a telegraph company, seeking to use the telephone system in its business of receiving and delivering telegraphic messages. In the opinion adopted by the Supreme Court, there are

... well reasoned opinions referred to, main-
 ... as to the right of the public,
 ... common law, irrespective of statute.
 ... founded upon the doctrine of *Munn*
 ... referred to in a previous part of this

... objections taken to the sufficiency of the
 ... petition for mandamus, and they were
 ... in argument before this court. But we
 ... the objections well founded. It is clear that
 ... the proper remedy in a case like the present,
 ... there is sufficient ground shown for it in the

... views expressed, this court is of opinion that
 ... the court below, directing the writ of mandamus
 ... should be affirmed, with costs.
 ... affirmed.

— This case is cited in *Com. Un. Tel. Co. v. N. E. Teleph. & Tel.*
 ...
 ... said case, also to *Franklin v. N. W. Teleph. Co., post.*

**COMMERCIAL UNION TELEGRAPH COMPANY v. THE NEW
 ENGLAND TELEPHONE AND TELEGRAPH COMPANY.**

Supreme Court of Vermont, October, 1888.

(61 Vt. 241.)

TELEPHONE COMPANIES.—DUTY TO THE PUBLIC.—DISCRIMINATION.

Telephone companies are so far common carriers as to subject them to the
 rule forbidding discrimination.
 The American Bell Telephone Company cannot, by virtue of its telephone
 patents or otherwise, lawfully provide by contract that its licensees shall
 discriminate in favor of or against particular telegraph companies.

Telegraph Co. v. Telephone and Telegraph Co.

Mandamus granted to a telegraph company compelling The New England Telephone and Telegraph Company, a local telephone company, to furnish facilities which had been refused in obedience to such a stipulation in its license.

Cases of this series cited in opinion : *Friedman v. W. U. Tel. Co.*, vol. 1, p. 621 ; *Smith v. Gold and Stock Tel. Co.*, ante, p. 373 ; *State, ex rel. &c. v. Bell Teleph. Co. of Mo.*, vol. 1, p. 304, note ; *Louisville Transfer Co. v. Am. Dist. Teleph. Co.*, vol. 1, p. 305, note ; *Chesapeake, &c., Teleph. Co. v. B. & O. Tel. Co.*, ante, p. 416 ; *State v. Nebraska Teleph. Co.*, vol. 1, p. 700 ; *Bell Teleph. Co. v. Commonwealth of Pa.*, ante, p. 407 ; *People, ex rel. &c. v. Squire*, ante, p. 176 ; *American Rapid Tel. Co. v. Conn. Teleph. Co.*, vol. 1, p. 390 ; *State, ex rel. B. & O. Tel. Co. v. Bell Teleph. Co.*, ante, p. 404.

PETITION for mandamus.

Wilson & Hall, for the relator.

Wales & Wales, for the defendant.

The opinion of the court was delivered by TYLER, J.:

This case was heard on the bill, answer and agreed statement of facts.

The relator and the defendant are corporations chartered and existing under the laws of the State of New York. The former as a telegraph company, since January, 1887, and the latter as a telephone company, since January, 1886, have been doing business in this State in compliance with its laws, with offices in the town of Rutland. The defendant, for certain fixed and uniform prices, had placed its telephone in public and private buildings and places of business in said town, and connected them with its central office. It had also connected the Western Union Telegraph Company with its central office, so that the latter company and its patrons, at the date of this petition, enjoyed all the privileges and profits to be derived from such connection. In February, 1888, the relator requested the defendant to place a telephone in its office in Rutland, and connect the same with its central office, and to grant to the relator and its patrons the privileges accorded to others, tendered to the defendant payment for such use and service, and offered to comply with all reasonable rules and regulations

several parties concerned. The contract is very elaborate and contains a great variety of provisions. By agreement, with certain exceptions, the National Bell Telephone Company was to acquire and become owner of all patents relating to telephones, or patents for the transmission of articulate speech by means of electricity. But it was expressly stipulated (art. 13, cl. 1) that the right to connect district or exchange systems, and the right to telephones on all lines, should remain exclusively with the National Bell Telephone Company (subsequently the American Bell Telephone Company), and those licensed by it. For the purpose, it was in terms provided that "such connections and other lines are not to be used for the transmission of general business messages, market quotations, or news for sale or publication, *in competition with the business of the Western Union Telegraph Company, or with that of the Gold & Stock Telegraph Company.* And the party of the second part [National Bell Telephone Company], *so far as it lawfully and properly can prevent it, will not permit the transmission of such general business messages, market quotations, or news, for sale or publication, over lines owned by it, or by corporations in which it owns a controlling interest, nor license the use of its telephone patents for the transmission of such general business messages, market quotations, or news, for sale or publication in competition with such telegraph business of the Western Union Telegraph Company, or that of the Gold & Stock Telegraph Company.*" The contract of the twentieth of May, 1882, under which the appellant derived its right to the use of the patented instruments, was made in subordination to the prior contract of the tenth of November, 1879, and contains a provision to conform to the restrictions and conditions just quoted. In the subordinate contract it is provided, that "no telegraph company, unless specially permitted by the licensor, can use the system to collect and deliver messages from and to its customers," etc.

These contracts are pleaded and relied on by the

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the exchange, nor for transmitting market quotations or news for sale, publication or distribution, nor for calling messengers, except from the central office, nor for performing any other service in competition with service which the exchange may undertake to perform."

The W. U. Tel. Co.'s office in Rutland, by an arrangement with the respondent and the Am. Bell Telph. Co., is furnished with a telephone, and is connected with the central telephone and connecting lines, for the purpose of transmitting and delivering telegraph messages from the subscribers and other customers of the exchange at Rutland to said W. U. Tel. Co., and transmitting messages from the latter company to such subscribers and customers, for the consideration of two cents for each message so delivered by telephone. The W. U. Tel. Co. pays the respondent two cents for each message, and said Am. Bell Teleph. Co. 15 per cent. on all the tolls received for transmitting such messages over the lines of said W. U. Tel. Co., of which 15 per cent. the respondent is to receive 50 per cent.

The relator claims that the defendant, having come into this State and established a telephone system under our laws, erected its lines and a central office in Rutland, has become a public servant, a common carrier of speech for hire, and is bound to serve all persons and corporations alike, upon their tender of equal pay for equal service, and a compliance with the defendant's rules and regulations. On the other hand, the defendant claims that its powers are restricted by the terms of its license; that its licensor, being the exclusive owner of its patents and property, had a right to grant to the defendant such limited use thereof as it pleased. The question here presented is not a new one. Counsel for the respective parties have, with great diligence and firmness, brought together in their briefs all the decided cases in this country that can throw light on the subject.

The principle contended for by the relator has frequently been applied to railroads and other carriers of persons and

reasonable rules and regulations. This the statute expressly requires in respect to telegraph lines, and, as we have seen, the same provision is made applicable to telephone lines and exchanges. The law declares that it shall be the duty of any person or corporation owning and operating any telegraph line within the State (which, as we have seen, includes a telephone exchange) "to receive dispatches from and for any telegraph lines, associations or companies, and from and for any individual," and to transmit the same in the manner established by the rules and regulations of the office, "and in the order in which they are received, with impartiality and good faith." And, such being the plain duty of those owning or operating telegraph lines or telephone lines and exchanges within this State, they cannot be exonerated from the performance of that duty by any conditions or restrictions imposed by contract with the owner of the invention applied in the exercise of the employment. The duty prescribed by law is paramount to that prescribed by contract.

Nor can it be any longer controverted that the Legislature of the State has full power to regulate and control, within reasonable limits at least, public employments, and property used in connection therewith. As we have said, the telegraph and telephone both being instruments in constant use in conducting the commerce and the affairs, both public and private, of the country, their operation, therefore, in doing a general business, is a public employment, and the instruments and appliances used are property devoted to public use, and in which the public have an interest. And, such being the case, the owner of the property thus devoted to public use must submit to have that use and employment regulated by public authority for the common good. This is the principle settled by the case of *Munn v. Illinois*, 94 U. S. 113, and which has been followed by subsequent cases. In the recent case of *Hockett v. State*, 105 Ind. 250, where the cases upon this subject are largely collected, it was held, applying the principle of *Munn v. Illinois*, that it was competent to the State to limit the price which

telephone companies might charge for their patented facilities afforded to their customers. And, if the price of the service can be lawfully regulated by State authority, there is no perceptible reason for denying such authority for the regulation of the service as to the parties to whom facilities should be furnished.

But, while not controverting the general principle stated, it has been strongly urged, in argument for the appellant, that the ownership of the American Bell Telephone Company of all telephone apparatus constructed by that company, or its agents, being absolute and exclusive, it had the right, in granting any license to use this apparatus, to limit such use by any conditions which it saw proper to impose upon the licensee. That in this case the licensee acquired but a limited right, and that it could impart no greater right to a subscriber to the exchange than that possessed by the licensee itself.

It is certainly true, as contended by the appellant, that the letters patent granted to Bell conferred upon him, his heirs and assigns, for a limited time, a monopoly in the invention or discovery patented, and the exclusive right to make, use, and vend the tangible property brought into existence by the application of the principle of the discovery or invention for which the patent issued. But it does not follow that those letters patent conferred upon him, or his assignees, any such exclusive right to apply or use the tangible property produced in a manner that other property could not be lawfully used. The license to use the telephone instruments in conducting and operating a telephone exchange, at once dedicated or devoted the instruments, to the extent of the requirements of that system or exchange, to public use ; and, so soon as the office of exchange was opened to the public, the instruments employed became instruments of public service, and, like all other property employed in the service, became subject to public regulation and control. And the fact that those instruments were the product of a patented invention or discovery, and the licensee had agreed to use them in serv-

ing the public, with certain restrictions inconsistent with the public regulation, can in no way, nor to any extent, relieve the party in control of the exchange from the full discharge of his duty under the law.

In the case of *Patterson v. Kentucky*, 97 U. S. 501, it was held that where, by the application of the invention or discovery for which letters patent had been granted, tangible property had come into existence, its use was, to the same extent as that of other species of property, subject to State control and regulation. In delivering the opinion of the court in that case, Mr. Justice HARLAN said: "These considerations, gathered from the former decisions of this court, would seem to justify the conclusion that the right which the patentee or his assignee possesses in the property created by the application of a patented discovery must be enjoyed subject to the complete and salutary powers, with which the States have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few. The right of property in the physical substance, which is the fruit of discovery, is altogether distinct from the right in the discovery itself, just as the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright of the map itself." The same doctrine was reiterated in the case of *Webber v. Virginia*, 103 U. S. 344, 348.

Now, applying to the case the principles stated, it would seem to be clear that there is nothing in the rights secured by the letters patent to Bell, and now held by the American Bell Telephone Company, nor in the contracts referred to, that justified the appellant in attempting to impose upon the proposed subscription to the exchange by the appellee, the restrictive conditions to which we have referred. By insisting upon such restrictive conditions there was an unjust discrimination made against the appellee, and in favor of a competing company. It was to prevent such discrimination that the law was enacted to which reference has been fully made.

The question presented in this case, and which we have decided, has been presented and decided by other courts of the country, though not with entire unanimity.

In Ohio, under a statute very similar to our own, the question was presented in the case of *State v. The Telephone Co.*, 36 Ohio St. 296. In that case the Supreme Court held, that, under the statute requiring that telegraph companies should receive dispatches from and for other telegraph lines, and from and for individuals, and transmit them with impartiality and good faith, a contract between the telephone company and the owner of telephone instruments, providing that the company, in the use of the instruments, should discriminate as between telegraph companies, was void, and therefore could furnish no justification for the attempted discrimination.

In Connecticut, however, under a statute somewhat similar to our own and that of Ohio, a different conclusion was reached, in the case of *American Rapid Tel. Co. v. Connecticut Telephone Co.*, 49 Conn. 352. In that case the court denied the force of the statute, as applied to the owner of the patented instruments, although such instruments were licensed to be used by the local telephone company. That case was strongly pressed in the argument before us, but we have not been able to yield to its authority, though certainly entitled to great respect.

In Pennsylvania, where a statute similar to ours exists, it has been recently held by the Supreme Court of that State, in the case of *Bell Telephone Co. v. Comm., ex rel. Baltimore & Ohio Tel. Co.* (Cent. Reporter, vol. 3, No. 19, p. 907), affirming the judgment of the court below for the reason assigned by it, that the restrictive or discriminating clause in the contract of the tenth of November, 1879, was simply void as against public right. That the telephone company, holding a license for the use of patented devices, could not discriminate against a telegraph company, seeking to use the telephone system in its business of receiving and delivering telegraphic messages. In the opinion adopted by the Supreme Court, there are

several other well reasoned opinions referred to, maintaining the same conclusion as to the right of the public upon principles of the common law, irrespective of state decisions. Those decisions are founded upon the doctrine of *Atchafalaya v. Illinois*, *supra*, referred to in a previous part of this opinion.

There were some objections taken to the sufficiency of the allegations in the petition for mandamus, and they were ingeniously pressed in argument before this court. But we do not think the objections well founded. It is clear that mandamus is the proper remedy in a case like the present, and we think there is sufficient ground shown for it in the petition.

With the views expressed, this court is of opinion that the order of the court below, directing the writ of mandamus to issue, should be affirmed, with costs.

Order affirmed.

NOTE.—This case is cited in *Com. Un. Tel. Co. v. N. E. Telephone Co.*, *post*.

See note to said case, also to *Franklin v. N. W. Telephone Co.*, *post*.

COMMERCIAL UNION TELEGRAPH COMPANY v. THE ENGLAND TELEPHONE AND TELEGRAPH COMPANY

Supreme Court of Vermont, October, 1888.

(61 Vt. 241.)

TELEPHONE COMPANIES.—DUTY TO THE PUBLIC.—DISCRIMINATION

Telephone companies are so far common carriers as to subject themselves to the rule forbidding discrimination.

The American Bell Telephone Company cannot, by virtue of its patents or otherwise, lawfully provide by contract that its licensees discriminate in favor of or against particular telegraph companies.

Telegraph Co. v. Telephone and Telegraph Co.

Mandamus granted to a telegraph company compelling The New England Telephone and Telegraph Company, a local telephone company, to furnish facilities which had been refused in obedience to such a stipulation in its license.

Cases of this series cited in opinion: *Friedman v. W. U. Tel. Co.*, vol. 1, p. 621; *Smith v. Gold and Stock Tel. Co.*, ante, p. 373; *State, ex rel. &c. v. Bell Teleph. Co. of Mo.*, vol. 1, p. 304, note; *Louisville Transfer Co. v. Am. Dist. Teleph. Co.*, vol. 1, p. 305, note; *Chesapeake, &c., Teleph. Co. v. B. & O. Tel. Co.*, ante, p. 416; *State v. Nebraska Teleph. Co.*, vol. 1, p. 700; *Bell Teleph. Co. v. Commonwealth of Pa.*, ante, p. 407; *People, ex rel. &c. v. Squire*, ante, p. 176; *American Rapid Tel. Co. v. Conn. Teleph. Co.*, vol. 1, p. 390; *State, ex rel. B. & O. Tel. Co. v. Bell Teleph. Co.*, ante, p. 404.

PETITION for mandamus.

Wilson & Hall, for the relator.

Wales & Wales, for the defendant.

The opinion of the court was delivered by TYLER, J.:

This case was heard on the bill, answer and agreed statement of facts.

The relator and the defendant are corporations chartered and existing under the laws of the State of New York. The former as a telegraph company, since January, 1887, and the latter as a telephone company, since January, 1886, have been doing business in this State in compliance with its laws, with offices in the town of Rutland. The defendant, for certain fixed and uniform prices, had placed its telephone in public and private buildings and places of business in said town, and connected them with its central office. It had also connected the Western Union Telegraph Company with its central office, so that the latter company and its patrons, at the date of this petition, enjoyed all the privileges and profits to be derived from such connection. In February, 1888, the relator requested the defendant to place a telephone in its office in Rutland, and connect the same with its central office, and to grant to the relator and its patrons the privileges accorded to others, tendered to the defendant payment for such use and service, and offered to comply with all reasonable rules and regulations

of the defendant company. The latter refused this request for the reasons stated in its answer, and specifically set forth in the exhibits "A" and "B," except on the conditions mentioned in exhibit "B."

The defendant is the licensee by contract "A" of the American Bell Telephone Company, a corporation created by and existing under the laws of Massachusetts. It is provided in said contract that no office or line of the defendant can be connected with any telegraph wire, except by lines of the licensor or parties specially designated by it for this purpose, and that no telegraph company, unless specially permitted by the licensor, can be a subscriber of the defendant, and so entitled to the use of its telephone; that the licensor in and by said contract reserved to itself the exclusive right to build and have built all lines connecting the various offices of the defendant with telegraph offices, and the right to operate such connecting lines; and further reserved the title and ownership of all lines which should be built, connecting the offices of said company with telegraph offices.

The contract further provides that, in case of violation by the defendant of any of its terms and conditions, such violation shall, in the election of the licensor, after certain prescribed notice, work a forfeiture of all its rights under the contract, and subject the defendant to other serious loss and damage. The defendant claims in the answer that it is legally prevented and restrained from connecting any of its offices with any telegraph company's office, and from allowing any telegraph company to become one of its subscribers, except by and with the special permission of the American Bell Telephone Company, its licensor, and that such permission in this case has not been given.

Said exhibit "B" contains the restriction that, "They are not to be used for any toll or consideration to be paid by any person, other than the subscriber, nor for furnishing any part of the work of collecting, transmitting or delivering any message in respect of which any toll or consideration has been or is to be paid to any party other than

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the exchange, nor for transmitting market quotations or news for sale, publication or distribution, nor for calling messengers, except from the central office, nor for performing any other service in competition with service which the exchange may undertake to perform.”

The W. U. Tel. Co.’s office in Rutland, by an arrangement with the respondent and the Am. Bell Telph. Co., is furnished with a telephone, and is connected with the central telephone and connecting lines, for the purpose of transmitting and delivering telegraph messages from the subscribers and other customers of the exchange at Rutland to said W. U. Tel. Co., and transmitting messages from the latter company to such subscribers and customers, for the consideration of two cents for each message so delivered by telephone. The W. U. Tel. Co. pays the respondent two cents for each message, and said Am. Bell Telph. Co. 15 per cent. on all the tolls received for transmitting such messages over the lines of said W. U. Tel. Co., of which 15 per cent. the respondent is to receive 50 per cent.

The relator claims that the defendant, having come into this State and established a telephone system under our laws, erected its lines and a central office in Rutland, has become a public servant, a common carrier of speech for hire, and is bound to serve all persons and corporations alike, upon their tender of equal pay for equal service, and a compliance with the defendant’s rules and regulations. On the other hand, the defendant claims that its powers are restricted by the terms of its license; that its licensor, being the exclusive owner of its patents and property, had a right to grant to the defendant such limited use thereof as it pleased. The question here presented is not a new one. Counsel for the respective parties have, with great diligence and firmness, brought together in their briefs all the decided cases in this country that can throw light on the subject.

The principle contended for by the relator has frequently been applied to railroads and other carriers of persons and

freight. It was held in *Bennett v. Dutton*, 10 N. H. 188, that the proprietors of a stage coach, who held them out as common carriers of passengers, are bound to receive all who require a passage, so long as they have room; and there is no legal excuse for a refusal, and it is not a legal excuse that they run their coach in connection with another coach, which extends the line to a certain place, and have agreed with the proprietor of such other coach not to receive passengers who come from that place on certain days, unless they come in his coach.

In the case of *New Eng. Exp. Co. v. Maine Cent. R. Co.*, 57 Maine, 188, the defendant let to the Eastern Express Company, for four years, the exclusive use of a certain separate apartment in a car attached to each of its passenger trains for the purpose of transporting the express company's messenger and merchandise, and agreed that it would not, during the continuance of such contract, use any space in any car on its passenger trains to any other common carrier; and the defendant, before the expiration of the contract, but after reasonable notice, refused to let such packages as are usually carried by express companies to be transported by its passenger trains. It was held that "common carriers are bound to carry indifferently, within the usual range of their business, for a reasonable compensation, all freight offered, and all passengers who may apply." For similar equal services they are entitled to the same compensation. All applying have an equal right to have their freight transported or to have their freight transported in the order of their application." * * * "The very definition of a common carrier excludes the idea of the right to grant monopolies, or to give special and unequal preferences, or implies indifference as to whom they may serve, and an equal readiness to serve all who may apply. They cannot, having the means of transporting all who apply, from those who may apply, some whom they may reject others whom they can, but will not, carry, and cannot rightfully confer a monopoly upon individuals."

corporations.” See also *Sandford v. Railroad Co.*, 24 Penn. St. Rep. 378.

In the case of *Southern Exp. Co. v. Memphis, etc. R. R. Co.*, 8 Fed. Rep. 799, the complainant, an express company, had been for many years engaged in carrying on an express business over the defendant's railroad. No written contract was ever entered into between the parties, but the business was carried on without objection, and upon terms mutually satisfactory, until some time in the year 1880, when the defendant asserted its own right to transact all the express business upon its line, and attempted to eject the complainant therefrom. Upon the application of the complainant a temporary injunction was granted; and, upon a motion to dissolve the same, McCraby, J., said that it was the duty of the defendant, as a public servant, to receive and carry goods for all persons alike, without injurious discrimination as to rates or terms; that railroad companies must carry express packages and the messenger in charge of them, for all express companies that apply, on the same terms, unless excused by the fact that so many apply it is impossible to accommodate all.

The same was held in *Samuel et al. v. Louisville and N. R. R. Co.*, 31 Fed. Rep. 57, where defendant discriminated against one of two rival lines of steamboats by charging it fifty cents a hundred more for freight than the other. Also, where a railroad company has established commutation rates for a particular locality, and sold commutation tickets thereat to the public, the refusal of such a ticket to a particular individual, under the same circumstances and upon the same conditions as such tickets are sold to the rest of the public, is an unjust discrimination against him, and a violation of the principles of equality which the company is bound to observe in the conduct of its business. *Atwater v. Del., Lack. & West. R. R. Co.*, 4 East. Rep. 186. In *McCoy v. C., I., St. L. & C. R. R. Co.*, 22 Am. Law Reg. 725, it was held that a railroad company was bound to transport over its road and deliver to all stock yards, at a certain point reached by its line, all live stock consigned which

shippers desired to consign to them, upon equal terms and in like manner, and it cannot bind itself to perform this duty for one to the exclusion of another and competing yard; and in *Hays v. Penn. R. R. Co.*, 22 Am. Law Reg. 39, it was held that a railroad, though owned by a corporation, is, in a qualified sense, a public highway, constructed for public uses, and everybody constituting part of the public for whose benefit it was authorized is entitled to an equal and impartial participation in the use of the facilities it is capable of affording. A discrimination in the rates of freight between the same points is unreasonable and unjust.

The same rule has been applied to gas-light companies. Where a citizen has made all necessary preparations to receive and use gas in his store or residence upon the line of a company's pipes, upon his compliance with the reasonable terms and rules of the company, the latter is bound to furnish him gas. *Shepard v. Milwaukee Gas-light Co.*, 6 Wis. 539; *The People v. Manhattan Gas-light Co.*, 45 Barb. 137.

A case more directly in point is that of *Friedman v. Gold & Stock Tel. Co.*, 32 Hun, 4, where a suit was brought to restrain the removal of two instruments in plaintiff's place of business. It was held that the defendant, being a public corporation, could make no distinction in respect to persons who wish to partake of the privileges which it was created to furnish, but owed the duty impartially to grant to all who complied with its rules, the privileges furnished. See, also, *Smith against the same defendant*, 42 Hun, 454, which was a suit brought to restrain the removal of "a ticker" or reporting instrument, maintained and operated by the defendant, and from doing or failing to do any act which would in any way interfere with the receipt by the plaintiff of the quotations of the New York Stock Exchange. The court, in commenting upon the obligations of corporations to the public, said: "These obligations do not rest on contract, but on the ground that when one is engaged in a business, public in its nature, he must, if public policy requires, serve the public impartially."

The case of *State, ex rel. Am. Un. Tel. Co. v. Bell Teleph. Co. of Mo.*, 22 Albany Law Journal, 363, was an application for mandamus to compel the defendant to connect the plaintiff's office with its wires, and give it the use of telephonic facilities. The defendant contended that it could not be compelled to do so, because by the terms of its license from the patentee of the invention it was forbidden to connect with any telegraph office or permit any telegraph company to become one of its subscribers. THAYER, J., said: "In my judgment, this clause of the contract is indefensible when called in question by any person or corporation injuriously affected thereby. In so far as the contract between the respondent and the patentee compels the former to discriminate against one class of its would-be-customers, and to deny them the same privileges and service which it accords to others, the contract is invalid. It is not possible to admit the principle that a railroad, telegraph or telephone company, may avoid the performance of any part of the paramount duty they owe to the entire public by contract obligations which they may enter into, even with the patentee of an invention."

In *Louisville Transfer Co. v. Am. Dist. Teleph. Co.*, 24 Albany Law Journal, 283, the plaintiff was a proprietor of public omnibuses and carriages, and the defendant was a telephone company, and also proprietor of public carriages. Upon an application by plaintiff for an injunction to restrain the defendant from removing its telephone from the plaintiff's office, and from refusing to transact its (plaintiff's) telephone business pursuant to contract, the defendant insisted that a mere rival in one branch of its business could not force it to afford it facilities which it had provided for another branch of its business. The court said: "The real contention between the plaintiff and defendant is confined to their carriage and coupé service; the defendant insisting that, as against the plaintiff, a rival in that business, it has the right to a monopoly in the use of its own telephone methods of communicating and receiving orders for coupés; that a mere rival in one branch of its

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business cannot force it to afford it the facilities which it has provided for another branch of its business; * * * that defendant is engaged in two distinct employments—one in operating a telephone exchange, and the other in operating carriage or coupé service. Plaintiff and defendant are not rivals in the former business, and as to that part of defendant's business, it occupies the same position toward the plaintiff as it does toward the rest of the public; that defendant is a *quasi* public servant, and as such is bound to serve the general public, including plaintiff, on reasonable terms, with impartiality; that defendant is governed by the principles of the law of common carrier." In *Chesapeake & Potomac Teleph. Co. v. B. & O. Tel. Co.*, 66 Md. 399, the court, holding the same view, said: "The telegraph and telephone are important instruments of commerce, and their service as such has become indispensable to the commercial public. They are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public. * * * They have no power to discriminate, and, while offering readily to serve some, refuse to serve others."

A recent case, and one relied upon by the relator's counsel, is that of *Balt. & O. Tel. Co. v. Bell Teleph. Co.*, 24 Am. Law Reg. 573, Circuit Court, E. D. Mo., which arose upon a state of facts nearly identical with those in the case at bar. BREWER, J., in giving the opinion of the court, from which TREAT, J., dissented, said: "Now, the question is whether the court can compel this defendant, doing the telephone business of this city, to establish communication with any other individual or company than that permitted by its license from the patentee. I believe fully in the sacredness of property, but I think all property stands upon an equal basis, whether that property consists of gold dollars in your pocket, real estate or the ownership of a patent. There is no peculiar sanctity hovering over or

attaching to the ownership of a patent. It is simply a property right, to be protected as such. Starting from that as a basis, while every property owner may determine for himself to what he will devote his property, yet the moment he puts that property into what I may, for lack of a better expression, define as the channels of commerce, that moment he subjects that property to the laws which control commercial transactions. * * *

A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all. It may not say to the lawyers of St. Louis: 'my license is to establish a telephonic system open to the doctors and the merchants, but shutting out you, gentlemen of the bar.' The moment it establishes a telephonic system here, it is bound to deal equally with all citizens in every department of business; and the moment it opened its telephonic system to one telegraph company that moment it put itself in a position where it was bound to open its system to any other telegraph company tendering equal pay for equal service.

"So my conclusion is that, notwithstanding the terms of this license, which seemed to inhibit it from dealing or giving its telephonic privileges to any other telegraph company than the Western Union, the moment it established its telephonic system here, that moment it compelled itself to respond to the demands of any telegraph company or any individual in the city tendering to it equal pay for equal privileges. The application for mandamus will be sustained."

The Supreme Court of Nebraska has rendered a similar decision in *State v. Neb. Teleph. Co.*, reported in 24 Am. Law Reg. 262. The same question was before the Supreme Court of Pennsylvania in *Bell Teleph. Co. v. Commonwealth of Penn.*, 7 East. R. 672, which contains a full review of the decided cases and in which the same doctrine is held. See, also, *People, ex rel. Postal Tel. Cable Co.*

v. Hudson River Tel. Co., 19 Abbott's New Cases, 466, decided in 1887.

The rule of law recognized in the foregoing cases does not in any wise conflict with section 4884 of the Rev. St. of the U. S., which in substance provides that every patent shall contain a grant to the patentee, his heirs and assigns, of the exclusive right to make, use and vend the invention or discovery throughout the U. S.; nor will the decision of the U. S. Supreme Court in *Gayler et al. v. Wilder*, 51 U. S. 478, that the monopoly of making, using and vending an invention or discovery created by this statute is all there is of a patent; that it is the power to exclude others from using the products of his labor without his consent which constitutes the whole property of a patentee. It is true that the owner may divide his right, conveying to one the right to make, to another the right to use, and to another the right to vend; that he may limit the time and the territory within which the subject of his patent may be used. *Adams v. Burke*, 84 U. S. 453; *Mitchell v. Hawley*, 83 U. S. 544; *Nicke v. Klein-knecker*, 7 Official Gazette U. S. Pat. Office, 1098; *Gamewell Fire Alarm Tel. Co. v. Brooklyn*, 14 Fed. Rep. 255. As to the right of the owner of a patent to limit the purpose for which it may be used, the case of *Pope Manufacturing Co. v. Owsley* (Cir., Ct. N. D. Ill.), 27 Fed. Rep. 100, is in point. There it was held that where a license does not purport to give an unlimited right to the use of the patent, but restricts the right to machines of certain descriptions, when the licensee makes machines not in conformity to his license, but within the patent, he not only violates his express covenant not to do so, but violates the patent. These general principles of law are specially applicable to patents and patented articles designed for private use.

The case most relied upon by the defendant is *Am. Rapid Tel. Co. v. Conn. Teleph. Co.*, 49 Conn. 352, in which the facts are like those in the case at bar. After stating the grounds upon which the application for mandamus was claimed, which were the same as in this case, PARDEE,

J., said: "But the property of the American Bell Telephone Company is absolute and exclusive; it can rent or sell it, in whole or in part; it can refuse to make or use, or to allow any one else to make or use, the telephone described in it; or it can make and sell one, and no more, and put such restrictions as it pleases upon the time, place and manner of using that; and it was the privilege of the Connecticut Telephone Company to purchase from it even the most limited right to use one or more of its instruments, and it is not within the power of the court either to enlarge or diminish the purchase." The learned judge reasons that the position of the defendant, which, by its contract with the licensor, has only a limited right to the patent, is unlike that of a railroad company which undertakes to put limitations upon the use of property absolutely its own. But if this is correct reasoning, it follows that the licensor may discriminate between different classes of business men, and indeed between different men of the same class.

Patents are property, and the right to sell or lease them is subject to the same restrictions as other property. The patentee cannot lease them for any use that contravenes principles of public policy. If he leases them for a public, rather than an individual use, he thereby gives the use to the whole public. In this case the American Bell Telephone Company might have licensed its patent to the defendant, so the latter alone could have used it; but when it went beyond this, and licensed the defendant to use it for the public, it in fact licensed it for all who desired its use, and offered compliance with reasonable conditions. The license, with the restrictive clause therein, cannot be regarded as the measure of the defendant's duty to the public. On grounds of public policy, which controls all public carriers, that clause in the contract in question is held void, so that the license stands precisely as if the restrictive clause were not contained in it. In the view of the case which we have taken, it seems unnecessary to make the Bell Telephone Company a party to these proceedings.

It is therefore ordered that a peremptory mandamus, in the usual form, issue out of this court under the hand and seal of the clerk thereof to the said defendant, the New England Telephone & Telegraph Company, commanding and requiring it, on payment to it by the relator, the Commercial Union Telegraph Company, of its usual and proper charges, and on compliance with its proper rules and regulations, to place one of its telephone instruments, with the usual and proper wires and connections, in the relator's office in Rutland aforesaid, and to connect the same with its central office in said Rutland in such a manner that the relator, its patrons, and other persons wishing to transact business with the relator, may have the same benefits and privileges to be derived therefrom that are accorded to others who have and use the defendant's telephones.

NOTE.—Contracts of local telephone companies with their licensors, by which they agree to discriminate against certain telegraph companies and in favor of others, have been declared invalid in the following cases so far reported in this series: MARYLAND—*Chesapeake & Pot. Teleph. Co. v. B. & O. Tel. Co.*, ante, p. 416. MISSOURI—*State, ex rel. Am. Un. Tel. Co. v. Bell Teleph. Co.*, vol. 1, p. 304, note; *State, ex rel. B. & O. Tel. Co. v. Bell Teleph. Co.*, ante, p. 404. OHIO—*State, ex rel. Am. Un. Tel. Co. v. Bell Teleph. Co. et al.*, vol. 1, p. 299. PENNSYLVANIA—*Bell Teleph. Co., of Phila. v. Commonwealth, ex rel. &c.*, ante, p. 407. VERMONT—*Com. Un. Tel. Co. v. Commonwealth, ex rel. &c.*, above reported.

The contrary was decided in CONNECTICUT—*Am. Rapid Tel. Co. v. Conn. Teleph. Co.*, vol. 1, p. 390.

FRANKLIN V. NORTHWESTERN TELEPHONE COMPANY.*Iowa Supreme Court, June 14, 1886.*

(69 Iowa, 97.)

"TELEGRAPH" INCLUDES "TELEPHONE."

A statute providing that actions against telegraph companies may be brought in any county through which its line passes is broad enough to include telephone companies.

Case of this series cited in opinion: *Iowa Union Teleph. Co. v. State Board*, vol. 1, p. 799.

ACTION to recover for labor rendered by plaintiff for the defendant under a written contract. The action was brought originally before a justice of the peace of Harrison township, Harrison county. Judgment was rendered for the plaintiff. An appeal was taken by the defendant to the Circuit Court, and judgment was again rendered for the plaintiff. The defendant appeals to this court.

J. W. Barnhart, for appellant.

Charles Mackenzie and *S. H. Cochran*, for appellee.

ADAMS, Ch. J.: The case involves less than \$100, and comes to us upon a certificate of appeal. The questions presented pertain to the jurisdiction of the justice of the peace, and to the jurisdiction of the Circuit Court. The defendant is a corporation organized under the laws of Iowa, and having its principal place of business in Ida county; and it contends that neither the justice of the peace of Harrison county nor the Circuit Court of Harrison county had jurisdiction to try the case. Sections 3507 and 3513 of the code provide that the jurisdiction of a justice of the peace does not embrace suits for the recovery of money against actual residents of any other county, except that, upon written contracts stipulating for payment at a particular place, suit may be brought in the township where the

payment was agreed to be made. The defendant, being a corporation organized under the laws of Iowa, and having its principal place of business in Ida county, is to be regarded as a resident of that county. The contract sued on does not provide for payment at a particular place. Such being the facts, the justice of the peace manifestly did not have jurisdiction, unless the jurisdiction was conferred by other provisions.

Section 2582 of the Code provides that actions may be brought against telegraph companies in any county through which the line passes or is operated. In the case at bar it was shown that the defendant's line, though not open for general business, passed through Harrison county, and was operated in that county. In *Telephone Co. v. Board of Equalization*, 67 Iowa, 250, it was held that a telephone company was to be regarded, for the purpose of taxation, as coming under the denomination of a telegraph company, within the meaning of the statute. We are not able to see why the reasoning, as applied to that case, based upon the substantial identity of telegraphic and telephonic modes of communication, would not be applicable to this. If we are correct in this, a telephone company may be sued in any county through which the company's line passes, and it would not be disputed that the district and circuit courts of the counties would have jurisdiction of such suits. Whether a justice of the peace would have jurisdiction is one of the questions controverted; but it appears to us that, under the reasoning in *Hunt v. Farmers' Ins. Co.*, 67 Iowa, 742, he would. If the justice of the peace had jurisdiction, as we think he did, it follows that on appeal the Circuit Court had jurisdiction.

Affirmed.

NOTE.—The English case of *The Attorney-General (Informant) v. The Edison Telephone Company of London, Limited*, Exchequer Division, Dec. 20, 1880, 43 Law Times, 687, is extensively cited and is a very interesting case on account of the extended discussion of the nature of the telephone.

The question at issue was the same as that in the case above reported, to

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wit, the application to the telephone of statutes pertaining to and using the word "telegraph."

The following is the decision in full :

The Attorney-General (Sir H. James, Q. C.) the Solicitor-General (Sir F. Herschell, Q. C.) Kay, Q. C., C. T. Simpson, W. W. Karslake and Moulton appeared for the Crown.

Benjamin, Q. C., and Cozens-Hardy, for the defendant company.

The facts, arguments and various acts of parliament are sufficiently set out in the judgment of the court (Pollock, B., and Stephen, J.) which was now read by

STEPHEN, J.: This was an information filed by the Attorney-General against the Edison Telephone Company of London (Limited) and heard before my brother Pollock and myself on the 29th Nov. and the following days. The facts were not in dispute, and they were as follow: The defendant company was formed in Aug., 1879, for the purpose of working two patents granted to Mr. Edison—namely, one on the 30th July, 1877, "for the invention of improvements in instruments for controlling, by sound, the transmission of electric currents and the reproduction of corresponding sounds at a distance;" and the other, on the 15th July, 1878, "for the invention of improvements in telephones and apparatus employed in electric circuits." The nature of the instruments patented and the manner in which they are used by the company are as follow: The telephonic apparatus consists of three parts—namely, first, an instrument called a transmitting instrument, into which a person speaks; secondly, an ordinary telegraphic wire through which an electric current passes; thirdly, an instrument called a receiving instrument, at which another person hears sounds. The transmitting instrument consists of a mouth piece, into which the person using the instrument speaks; a tympanum or disc, which vibrates under the impulse of the words spoken; and a substance brought into the lightest possible contact with the tympanum, and also brought into relation with the electric wire, the nature of which substance is such that the vibrations of the tympanum are by its means represented by variations in the electric current in the wire. The wire is exactly like any other telegraphic wire. The receiving instrument consists of a cylinder of chalk, which is damped by some chemical liquid, and is capable of being made to revolve by clock-work: a metal disc which touches the cylinder of chalk, and a tympanum. When the apparatus is to be used the chalk cylinder is made to revolve, whereby friction is produced between the surface of the cylinder and the disc which touches it. The electric current passes from the wire into the chalk, and as it passes decomposes a part of the liquid by which the chalk is moistened. The amount of decomposition is greater or less according to the variations produced in the current by the vibrations of the tympanum at the transmitting end. The decomposition of the fluid varies the degree of friction between the chalk cylinder as it revolves and the metal disc applied to it. These variations are represented by vibrations in the metal disc, and these vibrations cause the tympanum at the receiving end to vibrate in correspondence with the

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vibrations of the tympanum at the transmitting end, and so to emit sounds equivalent to those which are uttered at the transmitting end. The sounds so reproduced differ from the sounds uttered by the speaker, but they reproduce these sounds with such precision and completeness that the voices of different speakers at the transmitting end can be recognized and distinguished from each other at the receiving end. This account of the apparatus used by the telephone company would, of course, be altogether incomplete for scientific purposes, but it is, we think, sufficient for the purpose of explaining our judgment. We must now state the manner in which the apparatus described is used by the company. They have a central office in Queen Victoria street, called the central exchange. They have also district offices in various parts of London called district exchanges, and from the district exchanges wires run to the houses or offices of subscribers in the neighborhood. At each exchange, district or central, is an instrument called a switchboard, by which any two wires running from that exchange can be connected with each other. The switchboard is an instrument well known in telegraphic operations, and is constructed as follows: The wires running to the place where it is kept are brought down in front of the switchboard in a vertical direction and parallel to each other. Behind, but not in contact with them, are horizontal wires. If it is desired to connect any two of the vertical wires, a metal peg is put through a hole in each of the vertical wires to be connected till the peg touches the horizontal wire running between and behind the vertical wire. The electric current in the first vertical wire then passes down the peg put through that wire, along the horizontal wire, up the peg passed through the second vertical wire, and along the second wire. If a subscriber (A) wishes to communicate with another subscriber (B) the process is as follows: A first attracts the attention of a servant of the company stationed at the district or central exchange, as the case may be. He does this by pushing a button, by means of which an electric current lifts a spring which keeps in position a small metal shutter covering a number corresponding to A's name. The shutter falls. The servant upon this sees A's number and connects his own receiving instrument with A's wire. A thereupon names the person to whom he wishes to speak, namely, B. The servant puts A's wire in communication with B's wire, and shuts the shutter which has been opened, and A and B converse. When their conversation is over, one or both pushes his button and causes his shutter to fall, upon which the servant disconnects the wires. If the subscribers' wires are each connected with the nine district exchanges the words spoken pass over three separate wires, or portions of wire, which may belong to three different people, namely, A's wire (which may belong to or be rented by A), the small length of wire on the switchboard (which belongs to the company), and B's wire, which may belong to or be rented by B. If A. and B have to communicate through the central exchange, the words spoken would pass over five separate portions of wire, namely (1) A's wire to the district exchange, with which A communicates; (2) the company's trunk wire from the district exchange to the central exchange; (3) the small

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portion of wire on the switchboard at the central exchange; (4) the company's trunk wire between the central exchange and the district exchange, with which B communicates; and (5) B's wire to the district exchange, with which B communicates. Of these numbers 2, 3, and 4 belong exclusively to the company, No. 1 may belong to or be rented by A, and No. 5 by B. Agreements are made between the company and its subscribers by which the wire and the telephonic apparatus necessary for working them are leased to the subscriber at a rent, in consideration of which the company contract, among other things, that they will, "upon request made through the said telephone at any time during the continuance of this agreement, between the hours of 9 A. M. and 6 P. M., Sundays excepted, put the lessee in telephonic communication with the telephone of any other subscriber to the said exchange whose wire is free." The rents are so calculated as to leave a profit for the company after paying the expenses of maintenance, &c. The information charges that the use in this manner of the apparatus described is an infringement of the exclusive privilege of the Postmaster-General as to the transmission of telegrams. We must now consider what that privilege is. It is created by the 4th section of the telegraph act, 1869 (32 & 33 Vict. c. 73), in these words: "The Postmaster-General * * shall have the exclusive privilege of transmitting telegrams within the United Kingdom of Great Britain and Ireland, and shall also, within that kingdom, have the exclusive privilege of performing all the incidental services of receiving, collecting or delivering telegrams except as hereinafter provided." The third section defines the words employed as follows: "The term 'telegram' shall mean any message or other communication transmitted or intended for transmission by a telegraph. The term 'telegraph' shall, in addition to the meaning assigned to it in the telegraph act of 1863, mean and include any apparatus for transmitting messages or other communications by means of electric signals." The telegraph act of 1863 defines "telegraph" thus: "The term 'telegraph' means a wire or wires used for the purpose of telegraphic communication, with any casing, coating, tube or pipe enclosing the same, and any apparatus connected therewith for the purpose of telegraphic communication." Putting these enactments together, and substituting the definitions given for the words defined, the material part of sect. 4 of the act of 1869 will stand thus: "The Postmaster-General shall have the exclusive privilege of transmitting messages or other communications transmitted or intended for transmission by any wire or wires used for the purpose of telegraphic communication, with any casing, coating, tube or pipe enclosing the same, and any apparatus connected therewith for the purpose of telegraphic communication, or by any apparatus (other than such wire) for transmitting messages or other communications by means of electric signals." In simpler language, the Postmaster-General is to have the exclusive privilege of transmitting messages or other communications by any wire or apparatus connected therewith used for telegraphic communication, or by any other apparatus for transmitting messages or other communications by means of electric signals. The result of the definition seems to be, that

any apparatus for transmitting messages by electric signals is a telegraph, whether a wire is used or not, and that any apparatus of which a wire used for telegraphic communication is an essential part, is a telegraph, whether the communication is made by electricity or not. It would include, on the one hand, electric signals made, if such a thing were possible, from place to place through the earth or the air; and, on the other, a set of common bells worked by wires pulled by the hand, if they were so arranged as to constitute a code of signals. By sect. 6 of the act of 1869, "any company, corporation or person who transmits or aids, or is concerned in transmitting any telegram in contravention of the exclusive privilege," above referred to is rendered liable to a penalty of £5 for every such offense. Penalties are not asked for by this information, but the allegation made by it is that an offense has been committed, and the question for our determination is whether this is or is not the case. The case for the Crown is, that every such conversation as the one which we have supposed to take place between A and B is a "message or other communication transmitted by a wire used for the purpose of telegraphic communication with certain apparatus—namely, a transmitting and a receiving instrument—connected therewith for the purpose of telegraphic communication;" and that whenever such a conversation takes place, the speakers and the company, by their servant, transmit, and that the company, at all events, aid and are concerned in transmitting such a message or communication. More particularly, it was argued that every member of this definition is satisfied by such a conversation so carried on. The conversation must be a communication, even if the word "message" is less appropriate. It is "transmitted" or sent through a wire used for the purpose of communication, and that communication is telegraphic according to the common use of language, though it involves no writing. The various affidavits filed give a complete history of the word "telegraph," and show that from the first invention of semaphores till within the last few years no contrivance of the sort did literally write at a distance, but that the word was applied to a variety of contrivances which, by signals perceptible sometimes by the sense of sight, and sometimes by the sense of hearing, conveyed intelligence to greater distances in a much shorter time than a letter could be carried. On these grounds it was said that to hold such a conversation as described was to transmit a telegram within the meaning of the act. As to the exceptions, it was contended for the Crown that the burden of bringing the case within one or more of them was upon the defendants, which is no doubt correct. The arguments for the defendants may be reduced to three points—first, no communication by telephone is a telegram, because a telephone and a telegraph differ essentially; secondly, when two persons converse by means of a telephone, they do not transmit a message or communication within the meaning of the telegraph act of 1869; thirdly, if such a conversation is the transmission of a message or communication within the Telegraph Act of 1869, it is within either the first or the second of the exceptions in sect. 5 of the act of 1869. The first contention was supported by the following

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arguments: It was argued that telephonic communication consisted in the transmission of the human voice to distances greatly exceeding those which it can naturally reach by means altogether unknown in 1863, or even in 1869, when the telegraph acts were passed which we have to construe, and this, it is said, is an entirely new means. The transmitting instrument is, it was argued, quite new, the method of varying the force of the current in the wire, by collecting and impressing upon it the vibrations of the human voice, having been altogether unknown before the inventions of Mr. Graham Bell and Mr. Edison. In the same way the receiving instrument is absolutely new. In 1869 means were no doubt known by which the interruption and re-establishment of an electric current at the transmitting end of a wire would cause sound mechanically at the receiving end, but in such cases the sound was created at the receiving end—as, for instance, by magnetising and de-magnetising a piece of iron, which, when magnetised, drew down on itself a small steel bar with a click, which resumed its position by means of a spring when the magnet ceased to act as such; but the transmission of the actual vibrations of the voice through the length of the wire and their re-translation into sound at the receiving end were unknown till the recent invention. Thus the means used were entirely new, and so was the result produced. This is forcibly stated in various affidavits made by men of the highest scientific eminence. Sir W. Thomson says: “When the telegraph acts were passed, the telephone had not been invented, and no one concerned in that legislation had the slightest idea, nor had any one living the slightest idea, that it would be possible so to extend the power of speech as to enable persons at a distance to converse with each other.” Professor Stokes says: “Neither the transmitter nor the receiver of the telephone in any way resemble in their mode of operation the corresponding parts of a telegraphic instrument, and if a single word is to be used to include both a telephone and a telegraph it must, in my opinion, be wide enough to cover every instrument which may ever be invented which employs electricity transmitted by a wire as a means for conveying information.” Professor Tyndall says: “Prior to the labors of Bell and Edison it had never to my knowledge entered into the thoughts of scientific men to transmit, by means of electricity, the tremors of the human voice, so as to reproduce audible and articulate speech at a distance. The proof that this was not only possible but practical appeared to those most familiar with experimental physics to be an application of electrical and acoustical science, not only new but marvelous. I have, therefore, no hesitation in expressing the opinion that to confound the telephone with the telegraph would be to place in the same category utterly dissimilar things.” Dr. Fleming, who has been engaged for many years in the study of the subject, says: “The Edison telephone is only a complicated form of speaking trumpet;” and he also says: “When I, standing in an enclosed room, shout to another person in an adjoining room, the waves of sound from my voice beat against the wall, transmit their motion to the particles of the wall, and those again hand on the motion to the air in the other room. In

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this case the molecules of the wall constitute an apparatus by which the motion of the air in one place is repeated in another. The Edison telephone is just the same thing." So Lord Rayleigh says: "The speaking telephone is an instrument for artificially extending, by the use of electricity, the range of the human voice through which the human voice is audible. The only essential difference between a speaking telephone and a speaking tube is, that in the former the vibrations are transmitted in the electrical, in the latter in the mechanical form." Mr. Hopkinson says much the same at greater length. We have no reason to doubt the statements of these scientific merits of the transmitting and receiving instruments. Our attention was certainly called to a remarkable passage in a work by the Vicomte du Moncil, published in 1861, which no doubt suggests the possibility of such a contrivance as the telephone. Much evidence was also given as to an instrument invented in 1861 by a German named Reis, which, it was contended, had more analogy to the telephone; but to these matters we attach no importance, because we cannot see in the speculation of Du Moncil, or in what was done by Reis, anything that can be said, either in science or practice, to have anticipated the telephone of Edison or of Bell. Whether it is possible to speak of the telephone as actually transmitting sound, and as being of the nature of a speaking trumpet or speaking tube, seems much more questionable. Sir George Airy, Professor Adams and Mr. Siemens deny it, for reasons which we need not quote at length. Sir George gives his reason in a very few words: "I do not believe that the identity can be proved or reasonably stated to exist, and this I state as a reason that until we know the laws governing and the nature of the process which takes place during the transmission of sound through the wire, we really know nothing as to the nature and mode of operation of the electric currents or waves or impulses or tremors." It was argued that the identity at all is perceptible between the transmitting and the receiving instruments, that the sound produced at the receiving end is produced not by the sound uttered at the transmitting end, nor by the vibrations set up by the electric current in the wire, but by the vibrations of the diaphragm caused by the variations in the friction between the disc and the cylinder. It was further said that the sound heard at the receiving end differs in a marked way from the sound uttered at the transmitting end, and that though the difference between two voices can be recognized at the receiving end, this no more proves identity between the sounds uttered and the sounds heard than the fact that you can distinguish the face of A from the photograph of B proves identity between the faces of A and B and the photographs of A and B respectively. A consideration mentioned during the argument may perhaps be added. The telephone transmission of sound substitutes the velocity of light for the velocity of sound. If the sound made by the voice reached the receiving instrument through the telephone, it would reach it long after the telephone had spoken. It seems difficult to say that two sounds separately heard one after the other are each identical with the sound uttered, especially when the first sound arrives first makes a different impression on the ear both from the

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spoken and from the words as first heard. Mr. Cromwell Fleetwood Varley mentions that he and his brother arranged two parabolic sounding-boards in such a manner that they were accurately directed toward each other and that words spoken by one brother into the focus of the parabola were heard by the other brother at the focus of the other parabola at a distance of over two miles. It would take about eight seconds for the sound to traverse this distance. If, therefore, the words had been spoken into a transmitting instrument at one focus in telephonic connection with a receiving instrument in the other focus, the one sound would have been heard eight seconds before the other. Can it be said that the two sounds were one and the same sound, or that the one sound traveled simultaneously over the two intervals of space at two different rates of speed? We do not think it necessary to express any opinion on a controversy which is more scientific than legal, and perhaps more properly metaphysical or relative to the meaning of words than scientific, as it seems to turn upon the nature of identity in relation to sound. It is enough to say that, whatever may be the merits of the controversy, it does not appear to us that the fact, if it is a fact, that sound itself is transmitted by the telephone, establishes any material distinction between telephonic and telegraphic communication, as the transmission of it is performed by a wire acted on by electricity. We are of opinion, then, that, fully admitting all that has been or indeed can be said as to the novelty and value of the telephonic transmitter and receiver, the whole apparatus, transmitter, wire, and receiver, taken together, form "a wire used for the purpose of telegraphic communication, with apparatus connected therewith, for the purpose of telegraphic communication"—that is, they are a telegraph within the definition of the act of 1868, which is embodied by reference in the act of 1869. The wire is a wire. The transmitting and receiving instruments are apparatus connected therewith for the purpose of conveying information by electricity; and this, as it seems to us, is telegraphic communication. Indeed, though for scientific purposes it may no doubt be necessary to distinguish between telegraphs and telephones, it seems to us that the word "telegraph," as defined in the telegraph acts, is (to use Professor Stokes's words) "wide enough to cover every instrument which may ever be invented which employs electricity transmitted by a wire as a means for conveying information." Indeed, looking to the extension of the definition inserted in the act of 1869, the words "transmitted by a wire" might probably be left out of this definition. That this view does no violence to the common use of language is proved first, by the fact that in Mr. Edison's own specification the words "telegraph" and "telegraphic" are frequently used in reference to his invention, and that in "Webster's Dictionary," published in 1858, an electro-magnetic telegraph is defined under the head "telegraph," as "an instrument or apparatus for communicating words or language to a distance by the use of electricity," and under the head "Electro-magnetic telegraph," as "an instrument or apparatus which, by means of iron wires conducting the electric fluid, conveys intelligence to any given distance with the velocity of lightning." Of course, no one supposes that the Legis-

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lature intended to refer specifically to telephones many years before they were invented, but it is highly probable that they would, and it seems to us clear that they eventually did, use language embracing future discoveries as to the use of electricity for the purpose of conveying intelligence. The great object of the act of 1863 was to give special powers to telegraph companies to enable them to open streets, lay down wires, take land, suspend wires over highways, connect wires, erect posts on the roofs of houses, and do many other things of the same sort. The act, in short, was intended to confer powers and to impose duties upon companies established for the purpose of communicating information by the action of electricity upon wires, and absurd consequences would follow if the nature and extent of those powers and duties were made dependent upon the means employed for the purpose of giving the information. Suppose a company found it essential to erect posts along a highway, and suppose the body having control of the highway gave their consent, would the validity of the consent, and therefore the liability of the parties concerned to an indictment for obstructing the highway, notwithstanding such consent, be dependent on the question whether the messages were sent by an Edison's transmitter or by a Morse key? Or, again, suppose that the company favored particular customers, and so enabled their friends to get great advantages in trade or speculation over other persons, could they say, "We have a right to do so notwithstanding sec. 41, because we use telephones and not telegraphs?" Or, still more, if one of their clerks negligently refused to send a message or improperly divulged its contents, would they, for the same reason, be deprived of the summary remedy given by sec. 45? Nearly every section of the act would supply an additional illustration of the general conclusion that, but for the monopoly established in 1869, the Edison Telephone Company would be as anxious to be included in the act of 1863 as they are at present to be excluded from it; but this is only an accident, which cannot affect the interpretation of the act. Looking at the acts from the point of view of the Crown, we are led by a different road to the same conclusion. If a telephone is not a telegraph, then a telephonic communication is not a telegram, and if so any company may not only transmit such messages, but may perform all the incidental services of collection and delivery; and if this is so, there is nothing to prevent all the railroad and other companies in possession of telegraphs from applying to them telephonic transmitters and receivers, and carrying on the business of telegraphy just as they did before 1869. The customer would write his message at the counter and the clerk would speak it through the telephone instead of using a less perfect instrument. It is difficult to suppose that the Legislature intended to grant a monopoly so liable to be defeated, or that its language was meant to be so construed as to be limited to the then state of, perhaps, the most progressive of all sciences. In this connection we may dispose of one or two minor arguments by which it was attempted to show a distinction between telephonic messages and telegrams. It was said to be essential to a telegraphic message that it should be sent, not direct from party to party, but through the intervention of a messenger or clerk, and also that it

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should consist of signals having a conventional meaning, and not of actual words spoken. It seems to us impossible to regard these matters as essential to the process. A clerk may be regarded merely as an extra link in a chain of communication, and signals are only imperfect substitutes for words. It would be a strange thing to say that improvements by which a step in a given process can be dispensed with, and by which the process itself may be perfected, destroy the character of the process. To take such a view would be to affirm that imperfections in an instrument are essential parts of it, and that their removal destroys it. Apart from this a practical difficulty arises. There has been a constant progress in the subject of electric communication from its first invention to the present day. Some of the means employed require no code of signals, and some can be worked by any one who can read and write without any assistance from clerks. The A, B, C instrument worked by moving a hand successively to all the letters forming the message, and this moved a corresponding hand at the other end of the wire. Any two persons who could spell could use these instruments. Hughes's type-printing instrument prints the message in capital letters on a long narrow slip of paper. A telegraph called Cowper's writing telegraph has lately been invented, the nature of which is that a person holding a pen at one end of the wire can write or even draw with it, and that a fac-simile is produced by a corresponding pen set in motion by the electric current at the other end of the wire. Two papers were produced before us written in what was said to be Chinese character and exactly resembling each other. The one was written by a Chinese lady, and the other by the pen at the other end of the wire. Now, either these instruments are telegraphs and the messages sent by them telegrams within the act, or they are not. If Cowper's writing telegraph is within the act, it is difficult to say why a telephone is not. They equally dispense with clerks or messengers. If the sound is in any sense transmitted in the one case, the motions of the hand are in the same sense transmitted in the other. The one reproduces actual written words quite as accurately as the other reproduces words spoken, and if the one can properly be described as a complicated speaking instrument, the other can with equal propriety be described as an elongated pen. If, on the other hand, Cowper's writing telegraph is not within the act, it is equally difficult to say why Hughes's type-printer is within it. It requires no messenger or servant, at least at the receiving end, and it employs no special code of signals. It is, however, impossible to doubt that it is included, for it was in common use long before the act of 1869, having been invented in 1854, and having procured the Grand Prix for its inventor at the Paris Exhibition of 1867. The result seems to be that it is impossible to draw the line between these instruments, and that all or none must be regarded as coming within the definition of the term "telegraph" so often referred to. For all these reasons we hold that a telephone is a telegraph within the meaning of the acts of 1869 and 1863. The second point made by the defendant company was that, whether the telephone was a telegraph or not, the conversations held through it were not "messages or communications" sent by a

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telegraph within the meaning of the act. This contention was founded partly on the argument that the directness of communication between the parties to the conversation rendered the word "message" inappropriate, and partly on the telegraph acts of 1863 and 1868, which, it was said, use the word "message" in the sense of a substance with a message written upon it, and on the telegraph act of 1869, which, it is said, uses the word "communication" in a peculiar sense. As to the word "message," it is, no doubt, true that in several sections it is so used, but in others it seems to us to be used in the sense of the purport or tenor of the message. It is, for instance, an offense to delay to "transmit or deliver" a message. "Transmit" obviously applies to the words and not to the paper; "deliver" to the paper and not to the words; and so in other cases. The same remark applies to the act of 1868, in which the word "message" is frequently used, and which was commented upon by Mr. Webster minutely. All the difficulties raised or attempted to be raised appear to us to be capable of solution by the single principle already stated. The word "communication" in the definition of "telegram" given in the act of 1869 was said to have found its way there from sec. 16 of the act of 1868, which authorizes the Postmaster-General to make contracts with the proprietors of newspapers and others for the transmission or delivery of "telegraphic communications" to them at certain times and on certain terms, and it was rather suggested than expressly argued that such communications only would be telegrams within the meaning of the definition of the act of 1869. We do not agree with this view. The use of the word "communication" instead of message in sec. 16 of the act of 1868 certainly favors the opinion that there might be communications which would not be properly described as messages, but there is nothing in the definition of a telegram in the act of 1869, which suggests that the word "communication" which it contains is to be restricted to the communications mentioned in sec. 16 of the act of 1868. It is very possible that the use of the word in the one section may have suggested its use in the other, but there is nothing to narrow its sense in the last mentioned section. For these reasons we hold that a conversation held through a telephone is either a message, or, at all events, a communication transmitted by a telegraph, which is the definition of a telegram. A small question was raised on the word "transmitted." When one person speaks to another it was said he "makes," but does not "transmit," a communication. The answer is that when he speaks through a wire some miles long he sends what he says through the wire or transmits it. As the defendants contended that the very voice itself was so sent, this seems specially clear as against them. It was further argued that, admitting the conversations in question to be telegrams they were still not within the act of 1869, because the preamble of that act recites that "similar powers to those conferred upon the Postmaster-General with respect to the exclusive privilege of conveying letters should be enacted with reference to the transmission of telegraphic messages." This, it is said, confines the exclusive privilege as to telegrams within the limits within which the

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exclusive privilege as to letters is confined, and subjects it to the same tacit exceptions. But the exclusive privilege of the Postmaster-General as to letters is "the exclusive privilege of conveying from one place to another all letters" (7 Will. 4, c. 33, s. 2.) subject to certain exceptions. No express exception applies to the case of a man who carries his own letter with his own hand to the person to whom it is addressed. Yet this exception has always been regarded as tacitly implied in the act, and no one ever supposed that a man who came within it violated the Postmaster-General's exclusive privilege. It was argued, that, in like manner, if two friends communicated with each other directly by a telegraph of which they were joint owners, they would be outside of the sphere of the act of 1869. To this argument there are, in our opinion, several conclusive answers. In the first place, we do not think that the recital in the preamble of the act of 1869 ought to have the effect ascribed to it. Each act must be construed independently. The practical inconvenience of construing the post-office act literally would be so very great that it can never have been seriously proposed so to construe it. It is enough to say that such a construction would have involved the consequence that when a letter was written it must be left on the table at which it was written till the postman called and took it away, visiting every room in every house for that purpose. Such a consequence is an absurdity, but there is no absurdity in supposing that the Legislature meant to prohibit private electric telegraphs. The extent to which they were intended to be prohibited will appear from the exceptions to be considered immediately. In the next place, there is no real analogy between a man carrying his own letter to his correspondent's house and two telegraphing to each other. In the one case the act done can by no conceivable means injure the revenue. In the other case, an apparatus must be employed which may readily be made to injure the revenue. The object of the post-office act is to give to the Postmaster-General an exclusive right to earn all that can be earned by carrying letters, but a man cannot pay himself for carrying his own letter. If he gets a friend to carry it for him he might pay, and this case is accordingly provided for by an express exception. In the third place, the customers of the telephone company do not in fact communicate directly with each other. They are put in communication by a servant of the company, and their messages travel in all cases over at least one wire, and in many cases over three separate wires which are the property of the company. On all these grounds we hold that the conversations held through the telephone are infringements of the Postmaster-General's exclusive privilege unless they can be shown to be within the exceptions of that privilege. We now pass to two exceptions. Those which are said to apply are the first and second in sec. 5 of the act of 1869. The first is in these words — "telegrams in respect of the transmission of which no charge is made, transmitted by a telegraph maintained or used solely for private use, and relating to the business or private affairs of the owner thereof." The second is — "telegrams transmitted by a telegraph maintained for the private use of a corporation, company, or person, and in respect of which, or of the collection, receipt, and transmission, or delivery of which no

money or valuable consideration shall be or promised to be made or given." These exceptions resemble each other so closely that it is not easy to put a case of a telegram which would fall within the first exception and which would not fall within the second. Every "telegraph maintained or used solely for private use" must be a "telegraph maintained for the private use of a company, corporation, or person." A "telegram for which no charge is made" does not differ materially from a "telegram in respect of which, or of the collection, receipt, and transmission of which no money or valuable consideration shall be or promised" (the words "shall be" seem to be wanted before "promised") "to be made or given." And a message "relating to the business or private affairs of the owner" of the telegraph by which it is sent is a telegram. Thus the second exception seems to contain everything which can fall within the first and nothing more, except possibly telegrams not charged for transmitted by a telegraph used solely for private use and relating to the business of the owner of the telegraph, such telegraph not being maintained by the owner. But no case occurs to us in which a man is likely to own a telegraph and use it exclusively for his own business and yet not to maintain it. It was suggested that one of these clauses was added by way of amendment as the bill passed through Parliament. It may be so, but it is difficult to conjecture what the object of the amendment can have been. Whatever may have been the history of the two exceptions, the meaning of the first of them is in one point obscure. It authorizes individuals to keep telegraphs for their own use and to send messages by them relating to their own affairs so long as no charge is made for the messages. This condition is to us unintelligible. How could a man make a charge to himself for sending a message on his own telegraph about his own affairs? It seems as if the exceptions had been originally intended to provide for two classes of telegrams, sent by telegraphs maintained or used solely for private use—namely, first, telegrams relating to private affairs of the owner; and, secondly, telegrams relating to other people's affairs, sent as an exceptional favor and not charged for; but this is certainly not said. The second exception provides not only for most of the cases provided for by the first exception, but also for the case which seems to have been, for some reason, omitted from the first exception. The telegrams to which the second exception refers may relate to any subject so long as they are not charged for and so long as the telegraph by which they are sent is maintained for the private use of any corporation, company, or person. Upon the whole, the effect of the two exceptions seems to us to be that if a person, company, or corporation has a telegraph maintained bona fide for its own use—if, for instance, a banker has a telegraph to communicate between his office in the city and another office in a distant part of London, or if under the act of 1868 (31 & 32 Vic. c. 110, sec. 9. sub-sec. 8) a railway has made arrangements with a coal master upon the company's system for a private telegraph between his coal pit and a station, they may not only send telegrams on their own affairs, but may also, under special circumstances, and if no charge is made, send messages on the affairs of others. This view of the exceptions shows how wide the exclusive privilege granted to the Postmaster-General was

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intended to be. But for them it would be unlawful for the owner of works spread over a great space of ground to have a telegraph to communicate between the different parts of the establishment, or for a man of business with two offices in different parts of London to have a telegraph between them. This supports what we have already said as to the difference between the exclusive privilege of the Postmaster-General in relation to telegrams and in relation to letters. The privilege relating to telegrams seems to us to be the wider of the two. It was argued by the defendants that they were within the first exception, because in it the word "owner" ought to be read as including "owners," the effect of which was said to be that two persons might contribute to keep up a telegraph, and use it for communicating with each other on affairs interesting to either, that each of them might again communicate with others, and that thus the country might in theory be covered with a net-work of telegraphic wires, each connecting two persons only. It was further suggested that if this were lawful it would be lawful, in order to avoid circuitry and complication, to consolidate the individual wires into a small number owned by a large number of subscribers, and this, it was said, was practically what was done by the defendant company. This ingenious argument appears to us to be unfounded both in law and fact. The exceptions seem to us to apply exclusively to telegraphs kept either by a single owner or under one express provision of the telegraph acts, like the one already referred to; but, quite apart from this, it is obvious that the telegraphs of the defendant company are neither owned nor maintained by the subscribers, nor are they used solely by the owners. The switch board and the trunk wires are the property of the defendant company, and they are essential to the system of communication adopted. Moreover, a charge in the shape of rent is made for the transmission of messages, and from this the company derives a profit. Each of these circumstances takes the case out of the exceptions, or rather prevents them from applying to it. Lastly, it was asked by the defendants when and by whom the offence, if any, of the defendant company was committed? To this we think the answer is—that if several persons combine to do an illegal act, each is guilty of the whole of it, so that when A sends a telegram to B by means provided by the company for that purpose and under the provisions of a contract by which it is carried out, A, B and the company are all guilty of an offence under sec. 6 of the act of 1869—namely, the offence of transmitting a telegram. Apart from this, we think that when the company's servant puts A in telephonic communication with B, the company aids and is concerned in transmitting a telegram, which, again, is an offence under the same section. The result is, that we give judgment for the Crown, with costs. There will, accordingly, be declarations in the terms of paragraphs 1 and 2 of the prayer, an injunction in the terms of paragraph 3, and an order that an account be taken as in paragraph 4.

Judgment for the Crown.

Solicitor for the Post-Office, Horace Watson.

Solicitors for the defendant company, Waterhouse and Winterbotham.

Ex parte Jaynes.

EX PARTE FRANK JAYNES, ON HABEAS CORPUS.*Supreme Court of California, Sept. 15, 1886.*

(70 Cal. 638.)

PRODUCTION OF TELEGRAMS AS EVIDENCE.

An employee of a telegraph company, having charge of messages transmitted by it, is not guilty of contempt for refusing to obey a subpoena *duces tecum* commanding him to search for and produce all messages from and to a large number of persons therein named, between specified dates. The subpoena must identify the particular messages required.

APPLICATION for a writ of *habeas corpus*. The petitioner is an employee of the Western Union Telegraph Company, having charge of all telegrams transmitted from or received at the offices of the company in the cities of San Francisco and Oakland, and the town of San Rafael, in the State of California. On the 3rd of February, 1886, a subpoena *duces tecum* was regularly issued out of the Superior Court of the city and county of San Francisco, in an action there pending, commanding him to search for and produce any and all telegrams transmitted to or from such places by a large number of persons therein named, between specified dates. This the petitioner refused to do unless the particular messages sought were identified. For his refusal, he was adjudged guilty of contempt of court, and committed to jail. The further facts are stated in the opinion of the court.

P. G. Galpin, for petitioner.

The COURT: The petitioner was served with subpoena *duces tecum*, requiring him to produce telegraphic messages, but there was nothing to point his attention to any parti-

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cular message or messages ; he was required to search for and produce all messages from a number of persons to many other persons between certain specified dates. The service of the subpoena was an evident search after testimony. The petitioner was not bound to respond, and committed no contempt in failing to examine the papers under his control, to ascertain if any such messages had been sent or received.

The petitioner is discharged.

NOTE.—For other cases on this subject, see INDEX to vol. 1, “Production of Telegrams as Evidence.”

In *Tomline v. Tyler*, 44 L. T. 187 (1881), held that the English postal authorities might be ordered to produce specified telegrams for use in court.

Re Dwight and Macklane, 15 Ontario Reports, 148 (1888), was brought under the “Ontario Contraverted Elections Act.” A telegraph operator was subpoenaed to produce telegrams upon a trial. He testified that he had destroyed them after the subpoena was served on him, by the direction of the general manager of the company ; that by a rule of the company he should have destroyed them before, but had neglected to do so.

The manager was held to be in contempt, but the operator discharged, “the blame resting on his superior officer.”

Held, that no privilege attaches to telegrams in the possession of the telegraph company when demanded for purposes of evidence, by reason of a statute making it a misdemeanor for an employee of a telegraph company to divulge the contents of a private dispatch.

THE WESTERN UNION TELEGRAPH COMPANY v. CHARLES
H. WAY.

Alabama Supreme Court, Dec., 1887.

(83 Ala. 542.)

FAILURE TO TRANSMIT TELEGRAM.—CIPHER DISPATCH.—LIMITING LIABILITY.—LIMITING TIME TO PRESENT CLAIM.—DAMAGES.—SUNDAY CONTRACT.—DECLARATIONS OF AGENT.—EVIDENCE.

A stipulation limiting the liability of a telegraph company for errors and delays in transmission or delivery and exempting it from liability in

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transmitting cipher or obscure messages, does not apply in case of failure to transmit even a cipher dispatch.

The liability of the telegraph company for damages does not depend on the knowledge the operators may have of the contents of the message.

A stipulation that claim for damages must be presented within sixty days after the sending of the message, does not apply where the message was never sent.

For negligent failure to transmit a cipher dispatch announcing the acceptance of an offer, causing the loss of a sale, the damage caused thereby may be recovered of the telegraph company although the message was in cipher and its contents undisclosed to the company. Other questions as to damages considered.

Where a message was delivered for transmission on Saturday to be delivered in Germany on Sunday, held that the contract was complete on Saturday, and so not void under the Sunday contract law.

Declarations of an agent are not competent as against the company, when not part of *res gestæ*.

Where neither the message presented for transmission nor that delivered can be produced, secondary evidence of the contents of both may be given.

Cases of this series cited in opinion: *Ayer v. W. U. Tel. Co.*, *post*. *Sprague v. W. U. Tel. Co.*, vol 1, p. 204; *Daughtery v. Am. Un. Tel. Co.*, vol. 1, p. 588.

APPEAL from Circuit Court, Montgomery county. Action for damages for failure to deliver a telegram. Appeal by defendant below.

The telegram was in cipher, but its contents were made known to the agent at the time of presentation to him for transmission.

Further facts appear in the opinion.

Gaylord B. Clark and Jones & Falkner, for appellant.

Rice & Wiley, *contra*.

CLOPTON, J.: The appellee brings the suit to recover damages for the alleged negligent omission to forward a message addressed "*Victoria*, Bremen," which he delivered at the office of the appellant in Montgomery, June 14, 1884, for transmission. The message was intended for Johannes Roth, who resides in Bremen, Germany, *Victoria* being a cipher used to represent his name; and was a responsive

acceptance of an offer to buy cotton, made by a cablegram which plaintiff received from him on the same day.

The grievance complained of is that, by reason of the negligence of the defendant's agents, the message was not forwarded, and the plaintiff lost the benefit of the sale.

The complaint, as originally filed, contained but one count. More than a year after the commencement of the suit it was amended by the addition of two other counts, to the first of which the defendant pleaded the statute of limitations, basing the defense on the ground that the count introduced a new cause of action. The original complaint alleges that Roth's offer was to buy 1,000 bales of cotton, but was intended to be, and was, in fact, an acceptance of a previous proposition made by the plaintiff to sell 3,500 bales. The amendment avers a direct and positive offer to purchase 3,500 bales. The message in response and in acceptance of the offer, and the failure to forward which constitutes the causes of action, is substantially the same as set forth in both the original and amended complaint. The difference in the counts consists in the mere manner of stating Roth's proposal, which was the inducement to sending the message. There are also averments of other and additional special damages. The cablegram containing the offer does not enter into, nor constitute a part of, the real cause of action, and is only material as affecting the *amount* of recovery, not the *right* to recover. The amendment varies the descriptive allegations of matter alleged as inducement, but does not introduce new matter, or a cause of action not already in issue. It was allowable under our statute, and related to the commencement of the action. *Ala. Gr. So. R. R. Co. v. Arnold*, 80 Ala. 600.

2. The cablegram was delivered to plaintiff as coming from *Victoria*. Its delivery by defendant is the equivalent of an admission that *Victoria* was the sender; and, in connection with proof that *Victoria* is the cipher name of Roth, is *prima facie* sufficient to show, as against the defendant, that it was sent by him. The general rule, that secondary evidence of the contents of a writing is inadmis-

sible unless the absence of the original is accounted for, is applicable to cablegrams. It is immaterial in this case, which is considered the original—the message delivered by the sender to the forwarding office, or the telegram delivered by the company to the sendee at the point of destination. If the message delivered by Roth at the office in Bremen be the original, it is without the jurisdiction of the court; if the cablegram delivered to the plaintiff be regarded the original, the preliminary proof of loss was, *prima facie*, sufficient. In either case, the secondary evidence of the contents was properly admitted. *Whilden v. Planters & Merchants Bank*, 64 Ala. 1.

3. It is well settled that an agent has no power to bind his principal by admissions, unless they come within the scope of his authority, and are so proximate to the main fact in point of time as to be regarded a part of the “*res gestæ*,” serving to elucidate or explain the nature and character of the transaction. *Ala. Gr. So. R. R. Co. v. Hawk*, 72 Ala. 112. For the purpose of showing that the message was not forwarded, the plaintiff was permitted, against the objection of defendant, to testify to a conversation in reference thereto with Winter, an agent of defendant, and also to introduce a letter to Winter, and his reply. At the time of the conversation and of writing the letter, Winter was not in the performance of any duty relating to the transmission of the message, and had no authority to bind the defendant in the premises. They were merely narrations of a past transaction.

4. The lines operated by defendant do not extend to Bremen, and messages to be transmitted in that direction were delivered, in Nova Scotia, to a connecting cable line. The defendant is not compelled by any duty to the public to receive for transmission, or to secure the transmission of, messages beyond its own lines; and, if such service be undertaken, may fix terms, conditions and regulations, not contrary to law or public policy, on which it will receive and undertake to secure the transmission of cablegrams to points of destination in foreign countries.

Cablegrams were required to be written on forms used by the company, on the back of which were printed the terms and conditions on which they would be received, sent forward on its lines to the terminus thereof, and there delivered to the next connecting company. The message delivered by plaintiff was written on one of these forms, and signed by him. Immediately preceding the message the following is printed: "*Send the following message, subject to the terms and conditions printed on the back hereof, which are agreed to.*" Several of the pleas of the defendant are founded on these terms and conditions. Those set out in the pleas and specially relied on are that the company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery to the next connecting telegraph company, of any unrepeated message, beyond the amount of the charge which may or shall accrue to the company; nor for errors in cipher or obscure messages; nor for damages in any case where the claim is not presented in writing, within sixty days after the sending of the message.

A repetition of the message was not required or requested; it was in cipher; and a written claim for damages was not presented within sixty days after the failure of the company to forward it. It was never forwarded, but by some inadvertence was placed in the receptacle of messages sent, and was checked as such. It is contended that the reception of the message for transmission was matter of contract, the terms and conditions of which regulate the duty and measure the liability of defendant; and that, the company being in performance of a duty voluntarily undertaken, and the negligence not being gross or wilful, the terms and conditions exonerate the defendant from liability for damages beyond the amount of the charge. Many authorities are cited by counsel to sustain the reasonable character of these and similar terms and conditions, which, however, it is unnecessary for us to consider; for, if their reasonableness be conceded, before this arises another question — whether, on a proper construction, they govern and measure

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the liability of the company under the circumstances shown by the record in this case.

A telegraph company is engaged in a public calling, exercises important rights and powers, and owes corresponding duties to the public. By the established doctrine of this State a carrier can not stipulate for exemption from liability for negligence, whether gross, or wilful, or otherwise. *East Tenn. Va. & Ga. R. R. Co. v. Johnson*, 75 Ala. 596. The same rule has also been applied to telegraph companies. *Sweatland v. Ill. & Miss. Tel. Co.*, 27 Iowa, 433. On well-settled principles, founded on public policy, a telegraph company can not contract to be relieved from the exercise of due care and diligence in the transmission of telegrams to a point of destination over its own lines; and when it undertakes to secure the transmission of a message to a point of destination beyond the *terminus* thereof over connecting lines, the same rule applies as to transmission to the *terminus* of its own lines. A construction that the terms and conditions secure immunity from the consequences of the fault or neglect of the company's officers or agents, would condemn the contract as contrary to law, and deny it any force or effect. *Ayer v. W. U. Tel. Co.*, 10 Am. Rep. (Me.) 495; Gray's Com. by Tel., 49. Under the influence of the rule that, when a contract is reasonably susceptible of two constructions, one contrary, and the other agreeable to law, that construction should be adopted which will uphold the contract, and give it operation, we construe the terms and conditions as only an undertaking to exonerate the defendant from liability for errors which may be committed in the transmission of cipher or obscure messages, not caused by neglect, and for mistakes or delay in the transmission or delivery, or for the non-delivery of unrepeatd messages, which may be caused by any of the disturbing or obstructing agencies to which transmission by electricity is subject—generally, it may be said, in all cases where the negligence of the company is not the cause of the error, mistake, or delay, or non-delivery. They have no operation, and are inapplicable, when the message is never

started from the receiving office in the course of transmission. A failure to start the message is not an error, mistake, or delay in its transmission or delivery, or a non-delivery, as employed in the terms and conditions, but is a breach of the entire contract. A stipulation that, when there is no effort to forward the message, the company should only be liable for repayment of the charge, would be, in effect, to release the company from all obligation to perform the contract, because released from all liability for an *entire* breach—tantamount to its rescission. *Birney v. N. Y. & Wash. Tel. Co.*, 18 Md. 341; *Sprague v. W. U. Tel. Co.*, 6 Daly, 200.

6. The limitation as to the time in which a claim for damages must be presented, is in the nature of a condition subsequent, the non-performance of which operates a forfeiture of all damages. A condition operating a forfeiture, not being favored, will not be extended beyond the express or clearly implied terms. The terms and conditions do not contemplate that the company's agents would wholly fail to send a telegram in the regular and usual course of business, and do not provide, when there is no effort to forward the message, for immunity from damages by reason of omission to present the claim within the contractual period of limitation. By the express words of the contract the limitation does not commence to run until and from the time the message is started — “*after the sending of the message.*” There can arise no implication from these words that it was meant and intended that the limitation should begin to run from any date prior to the sending of the message, from the time it is received for transmission. It has no operation, unless there has been a partial performance by forwarding the message. When there is no attempt to start it, no effort to perform the contract, the right of action is not barred, unless the period prescribed by the statute of limitations has expired.

7. The next most important question relates to the measure of damages. It is manifest that, if the message was received and not forwarded, the plaintiff is entitled to

recover at least the amount paid for its transmission. For this reason, if no other, the affirmative charge requested by the defendant was properly refused. But the material question is, what, beyond this charge, constitutes recoverable damages? It is insisted that the only damages recoverable are such as were in the contemplation of the parties at the time the contract was made; and that, the message being in cipher, and its purport and importance not having been communicated, no damages in excess of the charge paid could have been in their contemplation. Counsel claim that such is the import of the rule established in *Hadley v. Baxendale*, 9 Exch. 341, and cite many authorities to support their contention. That case was fully considered and reviewed in *Daugherty v. American Union Telegraph Co.*, 75 Ala. 168. This decision is now assailed as unsupported by the weight of authority, and as not founded on reason and right. The contention is based on a misunderstanding of the rule intended to be declared in the *Hadley case*, and of the effect of the ruling in the *Daugherty case*. We do not understand the latter as intending to depart from the principle declared in the former, when properly understood and applied. That principle, as declared, was construed by this court in reference to the facts of the case and the questions involved, which called for the declaration of a rule applicable to recoverable damages arising from *special* circumstances. The principle, as thus construed, is that special circumstances which take the contract out of the usual course of things must be communicated, in order to become an element of the duty in reference to which the parties are presumed to contract, and, if unknown, damages suffered by reason of the existence of such special circumstances are not recoverable; but that, in all cases, the damages which would naturally, generally and proximately result from a breach of the contract, "according to the usual course of things," are recoverable; whether or not actually contemplated by the parties, the law conclusively presumes them to have been in their contemplation. Such, as this court understands, is the proper construction to be

placed on the words, "in the contemplation of both parties at the time they made the contract," as employed in the statement of recoverable damages in *Hadley v. Baxendale*. It is true, the opinion in *Daugherty's case* criticised this phrase, so often used as generally expressive of recoverable damages, as inapt and misleading, subjecting the rule to misapplication; but beyond this criticism of the mere language no attack was made in *Hadley v. Baxendale*. The contention in *Daugherty's case* was, as in this, that in respect to telegraph messages in cipher, the contents of which are not communicated, only the damages that were in the contemplation of the parties are recoverable. The ruling was that the liability of the telegraph company for damages does not depend on the knowledge the operator may have of the contents of the message. The argument sustains the conclusion, and relieves any necessity of a rediscussion. We adhere to the doctrine declared, and hold that, on the facts shown by the record, if the message was not sent, and the failure to send it was in consequence of the fault or neglect of the company's agents, as to which we intimate no opinion, the plaintiff is entitled to recover the damages which, according to the usual course of things, naturally grew out of such failure; but not damages arising from any special circumstances, the same not having been communicated.

9, 10. In estimating the damages, the contract with Roth, as it would have been made had the message of acceptance been delivered, must be regarded as an *entirety*. The plaintiff cannot accept a part of the contract, and claim its benefits, and reject another part, and avoid its burdens. The offer contained a condition that Roth should be authorized to purchase, for account of plaintiff, November contracts in New York, at the closing quotations of the day previous. It is undisputed that plaintiff would have sustained losses on such contracts. The net profits which would have been realized from the contract as an entirety constitute the actual damages suffered by plaintiff. There is, however, a modification of this rule. As soon as he was

informed the message had not been sent, it became the duty of plaintiff to take, within a reasonable time, steps to prevent further loss. If he had the cotton to deliver, or had arranged to procure it for delivery, he should have made an effort to sell it ; and, if he made future contracts for its purchase, for the purpose of fulfilling his contract of sale, he was not authorized to extend them from month to month, on a declining market, and fasten the loss on defendant. *Daugherty v. Am. U. Telegraph Co., supra.*

11, 12. Under the rule we have declared as regulating the measure of damages, the losses on account of the future contracts carried by plaintiff from the business of the previous season, and of the cotton bought from Clisby, cannot be regarded or estimated as elements of recoverable damages ; and the evidence showing such losses was irrelevant. They are uncommunicated special circumstances. Neither was the evidence relevant which tended to show the embarrassed financial condition of plaintiff. It raised a remote collateral issue, on which neither the liability of the defendant nor the proper ascertainment of the damages depends.

13. But, as data from which to ascertain the amount of damages, the court, on the evidence, submitted to the jury as an inference of fact, whether there was an arrangement between the parties by which the cablegram was understood to mean, and did mean, a purchase of 3,500 bales of cotton, and whether Roth would have been bound to accept that number of bales. The evidence on which the construction of the contract was thus left to the jury consists of a previous correspondence between the parties by mail, the cablegram, and the message delivered by plaintiff at the office of defendant. It is as follows : In May, 1884, plaintiff received a letter from Roth, proposing to buy cotton, the contents of which are not made known. About the last of the same month, plaintiff wrote Roth, rejecting his offer, and proposing to sell him from 3,500 to 5,000 bales, if he would take the pence price in Europe and November contracts in New York on the day the trade is made, as the

basis. On June 14th, thereafter, Roth sent plaintiff a cablegram in cipher, which is translated as follows: "*We offer firm for 1,000 bales average middling, nothing under low middling, at 6-8 d. cost, insurance and freight, and six per cent., prompt shipment by steamer, price 1-32 of a penny more, September delivery, provided give us authority to buy, at yesterday's closing quotations, November, New York, for your account.*" In response the plaintiff delivered, for transmission to Roth, the following message: "Accept the offer. How much?" In view of the fact that the proposition of the plaintiff was to sell from 3,500 to 5,000 bales, the inquiry, "How much?" indicated that plaintiff did not understand the cablegram to be an offer to purchase any definite number. If the construction of the contract was properly submitted to the jury, and the cablegram can be reasonably construed as an acceptance of the previous proposition of plaintiff, no specific quantity of cotton was agreed on, and there was no operative sale.

But was the construction of the contract properly submitted to the jury? When the legal effect and operation of a written instrument depends upon evidence of collateral facts "*in pais*," the inference of fact may, and should be, submitted to the jury; but when the evidence consists wholly of writings, and the legal effect and operation solely depend upon the meaning and construction of the words employed, it is the province and duty of the court to construe written instruments, and declare their legal effect. *Boykin v. Bank of Mobile*, 72 Ala. 262. The evidence on which the construction of the contract was submitted to the jury consists wholly of written instruments; being an offer of undisclosed terms to purchase, its rejection, accompanied by a counter-proposition to sell, which, without more, is followed by the cablegram, and the acceptance of the offer thereby made. There is nothing indeterminate or obscure; nothing for construction, or requiring the aid of extrinsic evidence. The cablegram varies the terms of plaintiff's proposition, not only as to the number of bales, but also as to the price at which the November contracts

should be purchased ; the proposition being that the basis should be the prices on the *day the trade is made*, and the cablegram being the *closing quotations of the previous day*. On no principle of legal construction can an offer to purchase a *specified* number of bales on *specified* terms be regarded an acceptance of a proposition to sell a larger and indefinite number on different terms. Had Roth's offer been accepted, he would not have been bound to take any number other than that stated in the cablegram. The court should have construed the writings, and instructed the jury that, had the contract been completed, it would have been for the sale of 1,000 bales, and no more.

14. The record does not make a case for the allowance of exemplary damages. The operator was not cognizant of the contents or importance of the message. The evidence does not tend to show that there was any negligence, wanton or wilful, or so gross as to evince an entire want of care, and to raise the presumption of "a conscious indifference to consequences." *Lienkauf v. Morris*, 66 Ala. 406 ; *Ala. Ga. So. R. R. Co. v. Arnold*, *supra*. Under the circumstances disclosed by the evidence, the plaintiff is only entitled to a just compensation for the actual loss sustained, if the failure to send the message was the result of negligence. The actual loss is the profits which he would have made had the contract of sale been perfected. In order to determine the profits, the difference between the contract price and what it would have cost plaintiff to procure the cotton and deliver it in Bremen in time for the September delivery, must be first ascertained. From this difference must be deducted the amount of the losses which plaintiff would have sustained had the November contracts been purchased on the closing quotations of the day previous. The remainder, with the amount of the charge paid by plaintiff for the transmission of the message, with interest, is the measure of recoverable damages. On the other hand, if the completion and performance of the contract, regarded as an entirety, would have resulted in loss to the plaintiff — that is, if the losses on the November

contracts would have exceeded the gains on the sale to Roth — he is not entitled to recover any damages, as growing out of the mere failure to complete the contract, other than nominal.

15. The cablegram purporting that plaintiff should procure the cotton in this country, for shipment to Bremen, evidence of the price of cotton in Liverpool is irrelevant, there being no proof of an influencing or regulating relation, or of a mutual dependence, between the markets; and all evidence relating to gains or losses should be excluded which does not tend to afford proper data from which to ascertain the actual gain or loss arising from the contract on the principles herein declared.

16 Evidence was introduced in reference to the character of the contracts. The defendant had the full benefit of the defense of illegality on the trial. There being no evidence tending to show that there was to be no delivery of the cotton, we need not consider the sufficiency of the pleas based on the gambling character of the contract. We may observe, however, that the pleas do not aver any law of Germany, where performance was to be made, which declares such contracts illegal, and we are without presumption. *Castleman v. Jeffries*, 60 Ala. 380. And there is no immediate or dependent connection between the offer of Roth and the future contracts of purchase made previously to the offer. These, we have already said, are not to be regarded as elements of damage.

17. By usage, Roth was not bound by the acceptance of his offer, unless it was delivered to him within twenty-four hours after the receipt of the offer. It was delivered to the telegraph company for transmission late on Saturday, and, to come within the required time, the delivery to Roth would have been on Sunday. On this ground, the defendant contends that plaintiff's act, sending the telegram, is illegal, and therefore he could not have been legally damaged by the failure of the company to forward it. Ordinarily, a contract by telegraph is complete when a telegram of acceptance, the offer not having been withdrawn, is placed by the offeree with the telegraph company for

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transmission, the parties having adopted such mode of communication in making the contract. All that plaintiff could reasonably have done to complete the contract was done on Saturday. A delivery within the limited time would have related back, and constituted a complete contract from the time the telegram of acceptance was deposited in the Montgomery office. By statute, contracts made on Sunday, and not within the statutory exceptions, are void. Code, § 2138. The contract to transmit the message was wholly made on Saturday, and its validity is not destroyed or impaired by a condition that, in order to bind the offeree, it must be delivered within a limited time, though compliance therewith may require delivery in Bremen on Sunday. The mere delivery of a telegram on Sunday is not an act prohibited by either statutory or common law; and, in the absence of proof, we cannot presume that such delivery is prohibited by the laws of Germany. The condition that the acceptance must be delivered within a specified time is a condition in favor of the offeree, and may be waived by him. The defendant cannot set up that a compliance with the condition would necessitate a delivery on Sunday, to avoid the consequences of an entire breach of a valid and legal contract.

Other questions presented become, under the views we have taken of the case, unimportant and immaterial, and their consideration is unnecessary. Reversed and remanded.

NOTE.—SOMERVILLE, J., dissented; holding that for damages arising in respect to a cipher dispatch, only the sum paid for transmission could be recovered, and citing many authorities in support of that view.

See INDEX to this and to previous volume, titles "Limiting Liability," "Limiting Time," "Cipher Dispatch," "Damages," "Sunday Contract," "Acts, &c., of Agent."

Upon the subject of damages in cases of default of telegraph companies, see vol. 1, notes at pages 58, 69, 108; the last especially as to cipher dispatches.

See note to next case.

In *Saunders v. Stewart*, 35 Law Times, 870 (1876), held that where a collector of telegraphic messages for transmission abroad received a cipher dispatch and negligently mis-sent it, so that the plaintiff, the sender, lost a profitable contract, only nominal damages could be recovered.

FRAZER & CO. v. WESTERN UNION TELEGRAPH COMPANY.

Alabama Supreme Court, December, 1887.

(84 Ala. 487.)

ERROR IN TELEGRAM.—REMOTE DAMAGES.

A judgment for defendant affirmed, in an action for damages for injury sustained by delay of a telegram announcing a rise in cotton, it not appearing that the loss was the natural or proximate result of the delay.

APPEAL from Bullock Circuit Court.

The telegram, by the defendant's delay in transmission of which the loss complained of was alleged to have been sustained, was sent to the plaintiffs by their brother, who had promised to keep them posted on the state of the cotton market. The telegram was received 5.15 P. M. The testimony conflicted as to whether it was presented for transmission at 3.30 or 4.30. The telegram notified plaintiffs of a rise in cotton. A few minutes before its receipt they sold. Their claim is that but for the delay they could have obtained a higher price.

Appeal by plaintiffs.

Norman & Son, for appellants.

Jones & Falkner and *John G. White*, *contra*.

SOMERVILLE, J.: The sending of the telegram by S. T. Frazer to the plaintiffs, Frazer & Co., by which was conveyed to them the intelligence as to the rise of cotton in Montgomery and other markets, was the volunteer act of one who was under no obligation to do it as an agent or otherwise. It was done as a mere favor, and seems to have had no proximate connection with the particular sale of

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cotton made by the plaintiffs on December 6, 1886, in which they sustained the loss now claimed by them as damages. It does not appear that plaintiffs expected or relied on this intelligence in shaping the terms and time of sale, nor that the failure to receive it exerted in fact any influence in inducing them to take the price for which they actually sold the cotton. The sending of the dispatch was, in other words, accidental in its nature, and not the outgrowth or product of any legal obligation assumed by the sender. The possession by the plaintiffs of the 140 bales of cotton on that day was accidental in its relations to the telegram, as was also the sale of the plaintiff's cotton. There was, legally speaking, no causal connection or relation between them.

No damage can be recovered, based on the defendant's negligence, unless it be the natural and proximate consequence of the act complained of in the action. If the damage claimed cannot be reasonably supposed to have entered into the legal contemplation of the parties at the time of making the contract, for the breach of which such damage is claimed, it is not recoverable.

The application of this rule is fatal to the plaintiffs' case. The evidence does not tend to prove that the damages claimed by the plaintiffs could have been within the legal contemplation of the contracting parties at the time of sending the telegram, in the delivery of which it is claimed there was negligence on the part of the defendant company.

The general charge could well have been given for the defendant, without hypothesis. The errors in the rulings of the court, therefore, if any, are errors without injury, and need not be considered.

Affirmed.

NOTE.—This and the preceding are the only Alabama cases in this volume, bearing upon the duties of telegraph companies as common carriers of messages. The following are to be found in vol. 1 of this series: *Daughtery v. American Union Tel. Co.*, p. 588; *W. U. Tel. Co. v. Meyer*, p. 282.

See INDEX to this and to prior volume, title "Damages."

See note to preceding case.

Stiles, Assignee, &c. v. Telegraph Co.

**T. L. STILES, ASSIGNEE, &C. v. WESTERN UNION TELE-
GRAPH CO.**

Supreme Court of Arizona, Dec. 1, 1887.

(15 Pacific Reporter, 712.)

WILFUL DELAY OF TELEGRAM.—DAMAGES.

A telegraph operator at the office at which a message was received announcing to a branch of a bank the general assignment of the bank, withheld the message from the evening of one day until after the opening of the bank for business on the next day, for the purpose of drawing out money belonging to himself and the telegraph company.

After the delivery of the message, the officers of the bank permitted other moneys to be withdrawn.

In an action by the assignee to recover all the money withdrawn while the message was withheld, *held*, that the withholding being gross negligence and palpable misconduct, the telegraph company must bear every legitimate consequence of its non-delivery; but that the payment of money after delivery of the message was not such legitimate consequence, and the recovery must be limited to that paid before.

APPEAL from District Court, Pima county. Action for damages. The facts are stated in the opinion.

J. A. Anderson and John Haynes, for appellee.

C. C. Stevens and R. B. Carpenter, for appellant.

PORTER, J.: This cause comes here on motion for a new trial on the grounds of insufficiency of the evidence, the findings and decisions being against law, and errors in law. This action was brought by T. L. Stiles, as assignee of Hudson & Co., against the Western Union Telegraph Company, to recover damages for the delay in the delivery of a telegraphic message sent by the plaintiff from Tucson to Tombstone. It appears that Hudson & Co., on the ninth

day of May, 1884, had a banking house in Tucson, with a branch establishment at Tombstone. Mr. M. B. Clapp, to whom the message was sent, was the cashier of the branch house, and there managed the bank. That on the evening of the ninth of May an assignment of all the property of Hudson & Co., both at Tucson and at Tombstone, was made to T. L. Stiles. Thereupon, on acceptance of the trust, the plaintiff, assignee, on the evening of the ninth of May, sent by defendant a telegram to Clapp, and with directions to forward the telegram immediately. The telegram was received by the operator at Tombstone at 9.15 of May ninth, and not delivered till the morning of the tenth, between 9.15 and 9.30, and after the bank was opened for business. The telegraph office at Tombstone was less than two blocks from the bank. Clapp's residence was in the same town, and he was there on the evening of the ninth. The usual time for delivering dispatches, when too late the night before, was from 8.30 to 9 A. M. The office of the telegraph company was opened at 8 o'clock A. M. The bank was opened at 9 o'clock A. M. Before the delivery of the message the telegraph operator (Kingsberry) drew from the bank the sum of \$1,167.71, and other smaller sums were withdrawn from the bank before the message was delivered.

On the opening of the bank on the tenth, the money in the vaults had been placed upon the trays on the counter for the day's business. On the reception of the dispatch, Clapp, the cashier, told the employees of its contents, and directed to have the money put back in the vaults, and then went to see plaintiff's attorney, and in the mean time directed the bank to be kept open. The business went on till the attorney came, and put up a notice, which was one-half hour after the delivery of the message. The sum of \$5,102.19 was paid out to unpreferred creditors, including the sum of \$1,167.71 paid on the check of the operator. The operator testified that \$1,000 of the \$1,167.71 belonged to him, and the balance to defendant. The books of the bank show an itemized statement of the amounts drawn

out by each depositor, and among them is the Western Union Telegraph Company, \$1,167.71. But that fact is immaterial. There can be no dispute but that the conduct of the operator was grossly negligent, and the defendant cannot be relieved of responsibility caused by his misconduct. No terms annexed to the message can excuse this failure to deliver the message before the opening of the bank; such failure to deliver being gross negligence and palpable misconduct, and the telegraph company must bear every legitimate consequence of its non-delivery.

But does that consequence involve anything which in this case happened after the message came to the hands of the bank? The telegraph company must be held for every dollar paid out before the message was delivered. We can see no good reason why it should be for the money afterwards paid, for any payments made after the delivery of the message were entirely voluntary on the part of the bank. A justification is sought because of the fear of a mob. No such exhibition existed, and the excuse cannot be sustained. The teller testifies that he paid checks because he feared, if he did not, that a rush would be made on them; that when he left the bank a large crowd had assembled there; but while the bank remained open for business there was no excitement, and but four people there outside of the employees. Why could not the employees of the bank have closed the outside doors, and then put the money in the vaults? Besides, it would only take a few moments to handle \$20,000 or \$30,000, which amount was in the trays in which coin is usually kept in banks. It not being otherwise shown, we take it that most of the money, as is the custom of banks in Arizona, was in gold coin, and only silver enough to make change.

We must conclude that the finding "that, by reason of said failure to deliver message, the plaintiff paid out to unpreferred creditors the sum of \$5,102.19," is erroneous. The record does not disclose the full amount paid out before the delivery of the message, saying only it was "other smaller sums," and there must be a new trial,

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unless plaintiff will, by written consent, accept from defendant the sum of \$1,167.71, with legal interest from the ninth day of May, 1884, in which case judgment for that sum is ordered to be entered.

WRIGHT, C. J. (concurring): We are clearly of the opinion that the defendant should not be held liable for amounts of money paid out after the dispatch was received at the bank. It required only a moment's time to step to the front door of the bank and close it. The law in such case does not hold the defendant responsible for avoidable damages. Undoubtedly a large portion of the money paid out would have remained in the bank if it had been closed immediately upon the reception of the dispatch. I therefore concur.

NOTE.—BARNES, J., dissented upon the ground that the recovery should be for the whole amount paid out by the bank after the telegram should have been delivered.

See INDEX to this and to prior volume, title "Damages."

See note to *W. U. Tel. Co. v. Way*, ante, p. 455.

See note, vol. 1, p. 99.

WESTERN UNION TELEGRAPH COMPANY v. COBBS.

Arkansas Supreme Court, Oct. 9, 1886.

(47 Ark. 344.)

ARKANSAS PENAL STATUTE.—LIMITING TIME TO PRESENT CLAIM.

A stipulation in a telegraph blank limiting the time for the presentation of claims in case of delay or failure in transmission or delivery, is confined to claims for damages and does not include those for the statutory penalty.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Jones*, vol. 1, p. 580; *Little Rock, &c. Tel. Co. v. Davis*, vol. 1, p. 526; *W. U. Tel. Co. v. Buchanan*, vol. 1, p. 1; *W. U. Tel. Co. v. Adams*, vol. 1, p. 442; *W. U. Tel. Co. v. Pendleton*, vol. 1, p. 632.

ACTION for statutory penalty for failure to deliver telegram. Appeal by defendant below from judgment of St. Francis Circuit Court.

U. M. & G. B. Rose, for appellant.

Geo. H. Sanders and Joseph W. Martin, for appellee.

SMITH, J.: The action was to recover the statutory penalty of \$100 for negligent delay in the delivery of a telegram. The defense was that the plaintiff had not exhibited his demand within sixty days from the time he sent the message. There was a jury trial, and the plaintiff had a verdict and judgment.

The message was received for transmission, subject to the following condition, which was printed on the blank form furnished by the company:

"The company will not be liable for damages in any case where the claim is not presented in writing, within sixty days after sending the message."

And it was admitted that the plaintiff had made no claim before bringing his action, which was six months after the message was sent.

The rejection of the following prayer is the only error assigned here:

"If you find that the plaintiff's message was written upon a telegraphic blank, upon which was printed a condition exempting the company from liability unless a demand in writing was presented within sixty days after the sending of the message, and if you find that no demand in writing was presented by the plaintiff within that time, you will find for the defendant."

In *W. U. Tel. Co. v. Jones*, 95 Ind. 228; S. C., 48 Am. Rep. 713, this point was ruled in favor of the telegraph company. It was said that "claims" is a word of very extensive signification, embracing every species of legal demand; that the word "damages" means that which is assessed in the plaintiff's favor as the amount of his recovery; and that the penalty given by the statute is in

this sense damages, it being recoverable, not by public prosecution, but by a civil action in the name of the sender of the message, in which the public has no interest.

But, with due deference to that learned court, we are unable to assent to its conclusion, or its train of reasoning. The notice for which the company stipulated was of a claim for damages. By damages we understand the indemnity, or compensation in money, which the law gives to an injured party for the breach of a contract or a duty. In theory they are precisely commensurate with the injury received, except in the case of exemplary damages or smart money, where some element of fraud, malice, gross negligence, or oppression, enters into the controversy. A penalty, on the other hand, is the punishment, generally pecuniary, inflicted by a law for its violation. It has no reference to the actual loss sustained by him who sues for its recovery. Field on Damages, sec. 1; 2 Greenl. Ev., sec. 253; Bouvier's Law Dic., *sub voce* Penalty.

As the object of the statute is not to recompense the plaintiff for the actual damage he has suffered, but to quicken the diligence of telegraph companies in the transmission of dispatches, it follows that this cannot be considered an action for damages. The plaintiff does not seek reparation proportioned to the loss or inconvenience to which he has been subjected; but to recover a penalty, the amount of which is fixed by statute, regardless of the fact whether his loss be great or small. He neither alleges, nor proves actual damages, nor was it necessary to do so. *L. R. & F. S. Tel. Co. v. Davis*, 41 Ark., 79; *W. U. Tel. Co. v. Buchanan*, 35 Ind. 429; S. C., 9 Amer. Rep. 744; *W. U. Tel. Co. v. Adams*, 87 Ind. 598; *W. U. Tel. Co. v. Pendleton*, 95 id. 12.

Nor can the statutory penalty be considered as in the nature of liquidated damages. This phrase is confined to cases where the extent of the damages has been determined by anticipatory agreement between the parties.

The only claim, to notice of which the company was entitled under the clause in question, was a cause of action

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sounding in damages—not debt for a penalty. The plaintiff had no such claim to present. As the message related to a family matter, it is probable the failure to deliver promptly caused no pecuniary detriment. The necessity for speedy information may exist equally in both cases, viz., to enable the company to ascertain the true cause of the miscarriage before time has obliterated the facts from human memory. But the language of the stipulation does not cover both cases; and it will not be presumed the parties intended something they have not expressed.

Affirmed.

NOTE.—See upon this subject, in addition to this and the previous case, *Little Rock, &c. Tel. Co. v. Davis*, 1 Am. Elec. Cas. 526.

See INDEX to this and to previous volume, title “Limiting Time.”

BALTIMORE & OHIO TELEGRAPH COMPANY v. LOVEJOY.

Supreme Court of Arkansas, November, 1886.

(48 Ark. 301.)

TELEGRAPH COMPANY.—ARKANSAS PENAL STATUTE.—JURISDICTION.

A justice of the peace has no jurisdiction of an action against a telegraph company, to recover the statutory penalty for failure to deliver a message.

Case of this series cited in opinion: *Little Rock & Fort S. Tel. Co. v. Davis*, vol. 1, p. 526.

FACTS stated in opinion.

J. C. Hawthorne, for appellant.

E. F. Brown, for appellee.

SMITH, J.: Lovejoy recovered judgment against the telegraph company for the penalty of \$100, given by section 6419 of Mansfield's Digest, for non-delivery of a message. It is now objected that the justice of the peace, before whom

the action was begun, had no jurisdiction of the subject matter.

The civil jurisdiction of justices is confined to three classes of cases. Actions arising on contract, actions of replevin, and actions for injuries to personal property. (Const. 1874, art. 7, sec. 40.) Unless, therefore, this is an action *ex contractu*, the objection must be sustained. Now a relation of contract does exist between the sender of a message and the telegraph company. But the action to recover the statutory penalty does not arise on the contract to transmit, but on the statute which imposes the penalty for neglect of the duty which the company owes to the public. This point was determined in *Bagley v. Shoppach*, 43 Ark. 375, which was an action against an officer to enforce a forfeiture for exacting excessive fees.

We are aware that in *Katsenstein v. R. R. Co.*, 84 N. C. 688, the Supreme Court of North Carolina reached an opposite conclusion. In that State the jurisdiction of justices of the peace in civil cases is limited to actions upon contracts. But it was held that an action to recover a penalty under a statute was an action upon a contract. The court seems to have been led to this conclusion by the consideration that, under the old system of pleadings, debt was the appropriate form of action to recover a penalty, and that debt was classified as an action *ex contractu*. But debt was not necessarily founded upon contract. It lay wherever the sum demanded was certain, without regard to the manner in which the obligation was incurred or is evidenced, as, for instance, on the judgment of a court of record. Hence, debt for a statutory penalty, while it was in form *ex contractu*, was in reality founded upon a tort. *Chaffee v. United States*, 18 Wall. 538; *Stockwell v. United States*, 13 ib. 542.

In *L. R. & Ft. S. Tel. Co. v. Davis*, 41 Ark. 79, a judgment similar to the one we are now considering was affirmed, but the question of jurisdiction was not raised, and escaped the attention of the court.

The judgment is vacated and the cause dismissed.

Frauenthal et al. v. Telegraph Company.

M. FRAUENTHAL ET AL. v. WESTERN UNION TELEGRAPH
COMPANY.

Arkansas Supreme Court, Dec. 17, 1887.

(50 Ark. 78.)

ARKANSAS PENAL STATUTE.

Section 6419, Mansfield's Digest, imposing a penalty on telegraph companies for negligent failure to transmit messages, was repealed by acts 1885, p. 176, which only forbids "discrimination as to charges or promptness." Cases of this series cited in opinion: *W. U. Tel. Co. v. Steele, post*; *W. U. Tel. Co. v. Swain, post*.

ACTION for statutory penalty. Appeal from judgment in favor of defendant, rendered by Circuit Court, Faulkner county.

Denison & Frauenthal, for appellants.

U. M. & G. B. Rose, for appellee.

SMITH, J.: The *tenth section of the act of March 31, 1885*, declares that

"Every telegraph company and telephone company doing business in this State must, under a penalty of \$500 for each and every refusal so to do, transmit over its wires to localities on its lines, for any individual or corporation or other telegraph or telephone company, such messages, dispatches, or correspondence as may be tendered to it by, or to be transmitted to, any individual or corporation, or other telegraph or telephone companies, at the price customarily asked and obtained for the transmission of similar messages, dispatches, or correspondence, without discrimination as to charges or promptness."

And by the fourteenth section of the same act, *section 6419 of Mansfield's Digest*, which imposed a penalty for a

negligent failure to transmit a dispatch, was expressly repealed. Session acts of 1885, p. 176.

The present action was brought to recover the penalty of \$500, prescribed by the act, for failing to deliver the following message :

“CONWAY, Ark., May 10, 1886

“*Cowgill & Hill, Carthage, Mo.*: Give us your lowest figures on flour.

“M. & J. FRAUENTHAL & Co.”

The telegram was transmitted promptly as far as Kansas City, Missouri, but was lost between that place and Carthage by the negligence of the defendant. A jury was waived and the court declared the law as follows :

The plaintiffs are not entitled to recover unless they show a refusal on the part of the defendant to transmit the message ; and a refusal to transmit does not mean mere negligence in transmission, but implies an act of the will on the part of the defendant or its servants, such as they wilfully decline or fail to transmit, intending that the message shall not be sent. If the defendant receives the message, and makes a *bona fide* effort to transmit, however negligently, there is no refusal.”

And as there was no evidence of a wilful refusal by the defendant to receive and transmit the message, the finding and judgment were in favor of the defendant.

Under the act of 1885, no penalty is recoverable for a mere negligent omission to transmit or deliver a message. For the redress of such injuries, the party aggrieved is remitted to his remedy for damages. This has been decided in Indiana, which once had upon its statute books a law similar to section 6419 of Mansfield's Digest, but repealed it, and substituted provisions substantially like our present law. *W. U. Tel. Co. v. Steele*, 108 Ind. 163; S. C., 9 N. E. Rep. 171; *W. U. Tel. Co. v. Swain*, 109 Ind. 405.

In the case first cited, the court say :

“It is settled law that a penal statute must be strictly construed, and we are therefore required to confine the operation of the statute to the case which it specifies, for

we cannot extend it by construction. Acting upon this rule, we must hold that the act of 1885 does not prescribe a penalty for neglect in transmitting messages. This conclusion is, indeed, the only one that can be reached without greatly enlarging the words of the statute; and it is strengthened by the fact that the statute, which the act of 1885 repeals, prescribed a penalty for a negligent breach of duty, while that of 1885 contains no such provision; thus clearly evincing the intention of the Legislature not to give a penalty for a negligent breach of duty."

Judgment affirmed.

NOTE.—This case was followed in *Baltimore & Ohio Telegraph Company v. State*; *Western Union Telegraph Company v. Sloan*, both reported together. Ark., the opinion being as follows:

SMITH, J.: These were actions against telegraph companies to recover the statutory penalty of \$500, under the act of 1885, for a negligent failure to transmit and deliver dispatches. The judgments, which were in both cases favorable to the plaintiffs, are reversed for the reasons stated in *Frauenthal v. Telegraph Co. (supra)*, and the causes remanded for further proceedings.

See note to *W. U. Tel. Co. v. Cobbs*, ante, p. 474.

THE WESTERN UNION TELEGRAPH COMPANY v. WILLIAM H. DUNFIELD.

Colorado Supreme Court, April 27, 1888.

(11 Col. 335.)

TELEGRAPH COMPANY.—LIMITING TIME TO PRESENT CLAIM.

(Head note by the court):

Plaintiff telegraphed to a bank not to pay a check, but the message was not delivered until after the bank had opened and the check been paid. The message was sent upon a blank containing a clause that no claim for damages for delay in delivering a message "shall be valid unless presented within 30 days after sending;" but plaintiff, while admitting his signature, denied the execution of the printed contract, and testified that

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the agent agreed to deliver the message before the bank opened. *Held*, the provision requiring claims to be presented within 30 days is a reasonable one; and, as plaintiff failed to claim damages within that time, his right of recovery is extinguished.

Cases of this series cited in opinion: *Heimann v. W. U. Tel. Co.*, vol. 1, p. 581, *W. U. Tel. Co. v. Jones*, vol. 1, p. 580; *Cole v. W. U. Tel. Co.*, vol. 1, p. 707; *W. U. Tel. Co. v. Rains*, vol. 1, p. 697.

APPEAL from Lake County Court.

This was an action by the appellee against the appellant for damages, claimed to have been occasioned by delay in delivering a telegram. The telegram was sent from Red Cliff to Leadville, and was as follows:

“Form No. 45.

“THE WESTERN UNION TELEGRAPH COMPANY.

“NIGHT MESSAGE.

“The business of telegraphing is subject to errors and delays, arising from causes which cannot at all times be guarded against, including sometimes negligence of servants and agents whom it is necessary to employ. Errors and delays may be prevented by repetition, for which, during the day, half price extra is charged in addition to the full tariff rates.

“The Western Union Telegraph Company will receive messages, to be sent without repetition during the night, for delivery not earlier than the morning of the next ensuing business day, at reduced rates, but in no case for less than twenty-five cents tolls for a single message, and upon the express condition that the sender will agree that he will not claim damages for errors or delays or for non-delivery of such messages happening from any cause, beyond a sum equal to ten times the amount paid for transmission, and that no claim for damages shall be valid unless presented in writing within thirty days after sending the message.

“Messages will be delivered free within the established free-delivery limits of the terminal office. For delivery at a greater distance a special charge will be made to cover the cost of such delivery, the sender hereby guaranteeing payment thereof.

“The company will be responsible to the limit of its lines only, for messages destined beyond, but will act as the sender's agent to deliver the message to connecting companies or carriers, if desired, without charge and without liability.

“THOS. T. ECKERT, General Manager.

NORVIN GREEN, President.

Receiver's No.	Time Filled.	15 Paid 30.	Check.
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“Send the following night message, subject to the above terms, which are hereby agreed to:

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RED CLIFF, 10-10, 1884.

"To the Carbonate Bank, Leadville, Col.: Don't pay check drawn to John Brown, in lead pencil, for hundred and ten dollars.

"Hn. & B.

WM. H. DUNFIELD.

"8.15 P. M.

"~~Read~~ Read the notice and agreement at the top.~~Read~~"

It was received at the bank at 9.15 the next morning. The bank then returned answer thereto, stating the check had been paid before receipt of the telegram, and this information was duly received by appellee. No demand of any kind for damages on account thereof was ever made, except by the commencement of this action, which was more than 30 days thereafter. In its answer to the complaint the appellant set up the contract upon which the telegram had been sent, and the failure to present the claim for damages within 30 days. In his replication (which was not sworn to) the appellee denied the execution of the contract set up. Upon the trial the original telegram was produced, and the appellee admitted that the writing and signature thereof were his, but testified, as he had alleged in his complaint, that the agent transmitting the telegram had stated and agreed that he could and would deliver the telegram at the bank at Leadville before it opened in the morning. Judgment was given for appellee for \$110, to reverse which this appeal was taken.

John L. Jerome, for appellant.

STALLCUP, C.: Under the facts of this case the provision of the contract requiring any claim for damages to be presented in writing within 30 days was a reasonable provision, and a failure to comply therewith constituted a waiver of such claim, and thereby an extinguishment of the right of recovery thereon. *Heimann v. Telegraph Co.*, 57 Wis. 562; *Telegraph Co. v. Jones*, 95 Ind. 228; *Cole v. Telegraph Co.*, 33 Minn. 227; *Telegraph Co. v. Rains*, 63 Tex. 27. The judgment should be reversed.

RISING and DE FRANCE, CC., concur.

Telegraph Co. v. Hyer Bros.

PER CURIAM: For the reasons assigned in the foregoing opinion the judgment is reversed, and the cause remanded.
Reversed.

NOTE.—See INDEX to this and to previous volume, title “Limiting Time.”

THE WESTERN UNION TELEGRAPH CO., Appellant, v. HYER
BROS., Appellees.

Florida Supreme Court, June 17, 1886.

(22 Fla. 637.)

DUTY OF TELEGRAPH COMPANY.—DELAY OF TELEGRAM.—RIGHTS OF
ADDRESSEE.—CIPHER DISPATCH.—DAMAGES.

(Head note by the court):

When a telegram is delivered to an operator, employed by a telegraph company, for transmission and delivery to the person to whom it is addressed, and the consideration for said service is paid to and accepted by such operator, the law enjoins on such company prompt and skilful performance of their undertaking.

If a telegraph company to whom a telegram has been delivered, as above, fail to transmit or to deliver the same to the person to whom it is addressed within a reasonable time, such company is responsible for such failure to the person injured, whether he be the sender or the person indicated in such telegram as the one to whom it was to be sent, for such damages as are proximate and reasonable, and naturally result from such failure.

It is no defense for said company, when sued for failure to transmit and deliver a telegram, as above, that the sender did not inform them or the operator of its importance, when they fail to show that, if they or their operator had received such information, it would in any respect have changed the method of its transmission, or the time in which it was to be sent, the agency employed, the price demanded therefor, or the degree of skill used in its transmission.

Nor is it any defense to said company that such message is in cipher or words, the meaning of which the operator does not know, provided such message is plainly written, and the words therein are in the letters of the English alphabet.

The appellees, ship brokers, residing in Pensacola, having been engaged by a customer to charter a vessel to carry a cargo of lumber from Pensacola to the United Kingdom, sent a telegram to their correspondent in Barbadoes, making an offer for the charter of a vessel. The offer was accepted, and a telegram sent appellees, which was received at the defendant company's office in Pensacola the next day, but which was never delivered to appellees. Their correspondent in Barbadoes, as their agent, signed the usual charter-party for appellees. Not receiving an answer to their dispatch, they told their customer that they had failed to charter the vessel, whereupon he chartered another. Two weeks afterwards the vessel came to Pensacola, as per the charter-party signed by their agent in Barbadoes. They were compelled to re-charter it at a loss. *Held*, that the telegraph company was responsible to them for such loss, and for their time and exertions in re-chartering such vessel.

Cases of this series cited in opinion: *Daughtery v. Am. Un. Tel. Co.*, vol. 1, p. 588; *Hart v. W. U. Tel. Co.*, vol. 1, p. 734.

APPEAL from the Circuit Court for Escambia county.

Action by addressee of a telegram for damages caused by delay in transmission. Facts stated in opinion.

W. A. Blount, for appellant.)

S. R. Mallory, for appellees.

The CHIEF JUSTICE delivered the opinion of the court :

Suit was brought by Hyer Bros. in the Circuit Court of Escambia county against the Western Union Telegraph Company for damages for non-delivery of a cablegram sent to them at Pensacola by their correspondent and agent at Barbadoes.

The proof showed that the plaintiffs were merchants and ship brokers at Pensacola, and that on the 12th day of September, 1883, they received a cablegram from their correspondent and agent at Barbadoes, as follows: "Prelate, Tellespont, lambent, speculum, divan, extol, pulpit, rabidy, Greenock, preferred, sluggard, excluded, stevedore, 'scam' 'slam,' which, being translated, meant: "We grant you refusal for 24 hours. Tellespont 5556-100 reg. half hewn, balance deals, £6 15s. full freight on beams fillings. U. K. Greenock preferred, £20 gratuity, stevedore excluded,

Commissions in thirds." Hyer Bros. answered the cablegram as follows: "To Laurie, Barbadoes: Wagon, extant, knight, sluggard, polygon," which being translated, meant: "For United Kingdom, full cargo sawn timber at £6. 10s. per standard and £20 gratuity, usual charter."

The agent at Barbadoes answered this dispatch, and the answer was received at the office of the Western Union Telegraph Company in Pensacola, September 14. It contained but one word, "Punctual." By the cipher code used by Hyer Bros. and their correspondent it meant, "we have closed the vessel as per your telegram." It was never delivered to Hyer Bros. The offer of H. B. for the charter of the vessel was based on an offer made to them by A. M. McMillan, of Pensacola.

Not receiving an answer to their dispatch, and thinking their offer was not accepted, they told McMillan that the offer was declined, and he secured another vessel. On October 2nd the vessel arrived at Pensacola, bringing a letter from their agent at Barbadoes containing a copy of the telegram, which had been sent as aforesaid to H. B., but not delivered; also, a charter-party which their agent at Barbadoes had signed for them in accordance with their offer. They had to re-charter the vessel at a loss.

The court instructed the jury to find their verdict as a special verdict, upon which, if in favor of the plaintiff, it should enter judgment for nominal damages, or for the amount of damages as found by the jury, as it might thereafter be advised. The jury returned a verdict for plaintiffs for \$618.90, and the said court, after being advised, entered judgment in favor of the plaintiffs and against the defendant, for said sum.

The defendant alleges here as error that the court erred in rendering judgment for other than nominal damages.

This question has never before been presented for adjudication in this State.

The courts in New York, Minnesota, Maryland, Wisconsin, Massachusetts, Nevada, and Maine, following the case of *Hadley v. Baxendale*, 9 Exch. 341, hold that only nomi-

nal damages can be recovered from the company undertaking to send the telegram, unless the sender should inform the operator of the special circumstances which constituted its importance, and the need of its correct and prompt transmission. The case of *Hadley v. Baxendale, supra*, was this: The plaintiffs, owners of a steam mill at Gloucester, had a shaft broken, and, desiring to have another made, they left the broken shaft with the defendant, a common carrier, to be carried to a foundry at Greenwich to serve as a model for a new one. At the time of making the contract, the defendant's clerk was informed that the mill was stopped, and that the plaintiffs desired the broken shaft to be sent immediately, but were not informed of the special purpose for which the broken shaft was to be forwarded. The carriers told the proprietors of the mill that they could deliver the shaft at Greenwich at a certain time. They failed to deliver it within the time, and a delay was caused in making a new one, and a consequent delay in starting the mill. The court said: "We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and substantially be considered as arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damage resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he, at the

most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances, for such a breach of contract. For had the special circumstances been known, the parties might have expressly provided for the breach of contract by special terms as to the damage in that case, and of this advantage it would be very unjust to deprive them. The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract."

All the cases above referred to rely upon the authority of this case of *Hadley v. Baxendale*, and are decided upon the theory that the principles of law regulating the conduct of common carriers applies equally to the transmission of messages by the electric telegraph system. The business of one is to transport from one locality to another some tangible object of weight and dimension. Experience does not suggest, in such a transaction, any other liability than compensation for its value if lost or destroyed in the transportation, or such damages for its delay as the object itself might suggest. The business of the other is the transmission from one person to another, and from one locality to another, of information or intelligence, nothing in itself, but as the basis and groundwork that is to influence the conduct of others, it is in this respect of the very first importance. One is limited to the transportation of tangible things; the other to the transmission of the intangible. There is no similarity in the services to be performed, in the nature of the things to be transported or transmitted, or the purposes to be effected, and as a consequence none as to the measure of damages for failure to perform their respective agreements.

The decision in *Hadley v. Baxendale* was proper and suited to the facts before the court, but an attempt to extend it to such cases as this would be productive of great injustice. The telegraphic invention has made the system the means of communication between all civilized countries

on the globe for a large part of the transactions and communications that prior to its invention were conducted by writing or by special messenger. No man can enumerate the vast number of subjects of treaty and intercourse that the complicated relations of mankind require its agency to accomplish. It can safely be said, however, that the larger part of all messages sent are of a commercial or business nature, which suggest value; the requirements of friendship or pleasure can await other means of less celerity and less expense. If this be true, why should the law assume that as a rule all messages sent over it are unimportant, and that an important one is an exception, of which the operator is to be informed? Whatever may be the rules of this particular defendant company, if they have any, there are none set forth in the record; whether, therefore, its rules are reasonable, or whether it can limit its liability by proper rules, when shown to have been known to its patrons, is in no sense involved in this opinion.

The common carrier charges different rates of freight for different articles, according to their bulk and value, and their respective risks of transportation, and provides different methods for the transportation of each. It is not shown here that the defendant company had any scale of prices which were higher or lower as the importance of the dispatch was great or small. It cannot be said, then, that for this reason the operator should be informed of its importance, when it made no difference in the charge of transmission. It is not shown that if its importance had been disclosed to the operator, that he was required, by the rules of the company, to send the message out of the order in which it came to the office, with reference to other messages awaiting transmission; that he was to use any extra degree of skill, any different method or agency, for sending it, from the time, the skill used, the agencies employed, or the compensation demanded for sending an unimportant dispatch; or that it would aid the operator in its transmission. For what reason, then, could he demand information that was in no way whatever to affect his

manner of action, or impose on him any additional obligation? It could only operate on him persuasively to perform a duty for which he had been paid the price he demanded, which in consideration thereof he had agreed to perform, and which the law, in consideration of his promise, and the reception of the consideration therefor, had already enjoined on him.

The system of telegraphy, founded, as it is, on a comparatively recent discovery of the practical capabilities of a well known elementary force, whose existence had hitherto made itself known more by its power of destruction, and the dread of its visitations, than by manifesting utility for the varied purposes of man, and having for its mission the almost instantaneous communication of ideas between persons widely separated as to distance, unlike any industry or enterprise that had ever been in use before, may justly be considered and treated as standing alone, a system unto itself.

The nearest approach to any similar enterprise is the system of carrying letters by mail; but, as this has been taken in charge and performed by the United States Government since its inception, and its acts or omissions cannot be made subjects of judicial inquiry, we can find no precedent in this country to aid in the solution of the questions that are dividing the courts. The same may be said as to want of precedents in that country to which we have so often and so successfully looked for assistance in other disputed questions. Prior to the reign of James I., when the post was first established in England, letters were sent by a messenger specially hired for the purpose, or intrusted to the honor of some wayfarer who chanced to be going to the place where the letter was desired to be sent. Butchers and drovers, whose business of buying cattle caused them to visit various parts of the kingdom, were the principal carriers of letters as late as the fifteenth century.

Any attempt to apply to such a novel system legal principles adapted to pursuits and occupations which are dissimilar in their nature, and designed for the accomplish-

ment of different purposes, must naturally result in failure and confusion. A recognition by the courts of this truth, and an application, from time to time, to its conduct, of such rules and regulations as common sense may suggest as fitted to its peculiar nature and purposes, without reference to systems that are not similar, and principles that are not analogous, is the only method preserving the law regulating its operation from contradictions and perplexities.

Similar difficulties have previously arisen in other branches of the law, when from their novelty, and a failure of applicable precedents, the courts, probably from fear of the hazard of framing new rules, or misled by a seeming analogy, have attempted to apply to such legal novelties long used principles of law, and to analogize the new to some old system with which they were familiar. This disposition of the courts, or, it may be said, of the human mind, for it exists equally elsewhere, is very forcibly and conclusively shown in the effort, when the tenure of partners in the joint property of the partnership was a new question in the English courts, to liken it to a joint tenancy or tenancy in common. This was the view, says Mr. Parsons, that was taken in all the early books. They all had the element of joint ownership of property, but in all other respects were different and independent; and the law for each should be sought for in itself. When this species of joint interest and ownership came under the cognizance of the courts of England, it was new to them, and new to the law of England, and it was perhaps unavoidable that they who administered the law should have sought to bring this new topic within the rules and principles of these kinds of joint ownership which were well known. Parsons on Partnership, pp. 2 and 3. Much of the confusion, says the same learned author existing to-day in suits and levies of a private creditor against a partner personally indebted to him, is due to the inability of the law of partnership to clear itself of the last remaining influences of the old notion that partnership was but one form of tenancy in common. *Ib.* 352 and 353.

Clay v. Telegraph Co.

The Supreme Court of Alabama, in the case of *Daughtery v. American Union Tel. Co.*, at its December term, 1883, reported in the Alabama Law Journal, May, 1884 (75 Ala. 168), and the Supreme Court of California, in the case of *Hart v. W. U. Tel. Co.*, April term, 1885 (66 Cal. 579), have laid down a doctrine more harmonious with justice, and more applicable to the peculiar characteristics belonging to the system of telegraphy. They hold that a telegraph company is liable for damage resulting naturally, and in the usual course of business, from its failure to send or deliver a dispatch correctly and promptly, without requiring the sender to disclose its importance to the company or its agent.

It is of no consequence whether the dispatch is in plain English or in cipher, provided such cipher is written in the letters of the English alphabet.

The judgment of the Circuit Court is affirmed.

NOTE.—RANEY, J., wrote a dissenting opinion, holding that the telegram being in cipher and its contents or importance not known to the company or the operator, only the price of transmission could be recovered.

This case was in part overruled in *W. U. Tel. Co. v. Wilson*, 32 Fla. 527.

See note to *W. U. Tel. Co. v. Way*, ante, p. 455.

See INDEX to this and to previous volume, titles "Damages," "Receiver or addressee."

See notes, vol. 1, pp. 89, 108.

See note to *W. U. Tel. Co. v. Longwill*, post.

J. J. CLAY v. WESTERN UNION TELEGRAPH CO.

Georgia Supreme Court, May 28, 1888.

(81 Ga. 285.)

DELAY OF TELEGRAM.—DAMNUM ABSQUE INJURIA.

A telegraph company cannot be charged with damages based upon a mere possible opportunity of profit which the addressee of a telegram may have lost by reason of delay in transmission or delivery.

ERROR from Superior Court, Bibb county.

Action for damages. Appeal by plaintiff from judgment sustaining error to declaration. Facts appear in opinion.

S. A. Reid, for plaintiff.

Guerry & Hall, for defendant.

BLANDFORD, Justice : It appears that a telegram was sent to Clay, the plaintiff, as follows :

“ BULLARD'S, Ga., January 8, 1885.

“ *To J. J. Clay*: Meet us at E. T. depot on this evening's train prepared to arrange for shipment to Indianapolis my mother-in-law's remains.

“ [Signed,] D. G. HUGHES.”

The telegraph company failed to deliver this telegram in time for Clay to meet the train and comply with the directions of the sender. Clay brought his action against the company for damages. We cannot see, from the allegations in the declaration, how Clay was damaged. It does not appear that he suffered any damage. It appears that he lost a mere opportunity or possibility to make something. If he had received the telegram, and had appeared at the depot in time to meet the remains, and if Mr. Hughes had declined his services, all that he could have recovered from Hughes would have been his expenses and a proper compensation for his trouble in getting ready to perform these services. Clay did not go to meet the remains, and did not spend anything on this account ; he was in the same condition after receiving the telegram that he was before ; no loss came to him. It is contended that if he had received the telegram, he would have made a considerable amount of money as profits from services rendered. He might have made it or he might not. As stated, this was merely a possibility. Under the allegations in the declaration, we do not think he had any right to recover damages, and that the judge did right to sustain the demurrer to the declaration.

As to whether the telegraph company is liable at all for

Telegraph Co. v. Reid Bros.

non-delivery of the telegram, we say nothing as to that at this time. There was plenty to authorize the court to sustain the demurrer, without going into that question at all. Judgment affirmed.

NOTE.—See INDEX to this and previous volume, title “Damages.”
See note to *Cothran v. W. U. Tel. Co.*, *post*.

THE WESTERN UNION TELEGRAPH COMPANY v. REID BROS.

Georgia Supreme Court, April 8, 1889.

(88 Ga. 401.)

MISSENDING TELEGRAM.—DAMAGES.

(Head note by the court):

When goods ordered by telegraph were sent to the wrong place, in consequence of an error of the company in repeating the dispatch at an intermediate point, and sending it forward, the measure of damages is not the full value of the goods at the place to which they should have been sent, with no deduction for their value at the place to which they were actually sent.

A person injured by the negligent act of another must use reasonable diligence to render the damage as little as practicable, after discovery of the negligence and its probable consequences.

Case of this series cited in opinion: *Marr v. W. U. Tel. Co.*, *post*.

ERROR from Superior Court, Thomas county.

MacIntyre & MacIntyre, for plaintiff in error.

W. M. Hammond, *contra*.

BLECKLEY, Chief Justice: Reid Brothers sent a telegram from Thomasville to New York, ordering sacks. In repeating the telegram at Savannah, there was an omission to show that it was sent from Thomasville. In consequence of this omission, the sacks were forwarded by a common carrier to Savannah. In a suit by Reid Bros. against the

company, a recovery was had upon the basis of the value of the sacks at Thomasville, without any deduction of their value at Savannah. We think this was error. The mistake was discovered in time to order the sacks to be forwarded from Savannah to Thomasville, or to direct the sale of them to be made at Savannah. Neither was done. Reid Brothers paid their correspondent for them, but took no measures to have them sold at Savannah, forwarded to Thomasville, or abandoned to the telegraph company. Surely one of these measures was essential to a recovery of their full value at Thomasville. The bill of lading was sent to them, and the title to the sacks is still in them. The carrier is responsible to them. Speaking generally, they have the sacks now. This being so, it would seem plain equity that the value of the sacks where they are should be deducted from the amount of the recovery. The authorities all hold that it is the duty of the injured party to exercise some degree of diligence in rendering the damage of a negligent act as little as practicable. *Marr v. Western Union T. Co.* (Tenn.) 16 Am. & Eng. Corp. Cas. 256. It is suggested that *Athens Mfg. Co v. Rucker*, 80 Ga. 291, conflicts with this doctrine; but we think an examination of the case will show that it does not. See *Mather v. Butler County*, 28 Iowa, 253; *Missouri v. Powell*, 44 Mo. 436. The principle which we seek to apply in this case is found in Gray, Tel., § 100; *W. & N. O. T. Co. v. Hobson*, 15 Grat. 122. See *Leonard v. N. Y. etc., Tel. Co.*, 2 Hand, 41 N. Y. 544.

The great fact which stands out before our minds is that wherever the sacks may be, and whatever they may be worth, Reid Brothers still own them, have the title to them, and yet they have recovered of the telegraph company their full value. We think the measure of damages recognized by the court was not the proper one, and that there should be a new trial.

Judgment reversed.

NOTE.—See note to next case.

See INDEX to this and to previous volume, title "Damages."

Cothran v. Telegraph Co.

COTHRAN & Co. v. THE WESTERN UNION TELEGRAPH
COMPANY.

Georgia Supreme Court, May 13, 1889.

(83 Ga. 25.)

ERROR IN TELEGRAM.—DAMAGES.—ILLEGAL CONTRACT.

(Head note by the court):

Contracts for fictitious or option "futures," made in Georgia, being illegal, whether between principal and principal, or broker and principal, where both parties are in complicity touching the unlawful purpose, such contracts, or the loss or gain resulting from them, cannot be invoked to measure the damages sustained by the sender of a telegram in consequence of a mistake made by the company in transmitting the message. If the *Tel. Co. v. Blanchard*, 68 Ga. 299, is to be regarded as involving a Georgia contract respecting transactions in futures, it stands overruled in principle by the *Bank v. Cunningham*, 75 Ga. 366.

Case of this series cited in opinion: *W. U. Tel. Co. v. Blanchard*, vol. 1, p. 404.

APPEAL by plaintiffs from judgment of Superior Court, Floyd county.

The official report is as follows:

Cothran & Co. sued the Western Union Telegraph Co. in a magistrate's court, for damages alleged to have been sustained by the omission, by the carelessness of defendants' agent, of the word "sell" from the following telegram:

"Check. ROME, Ga., 10 Mch., 1887.

6 P. M. 30 Paid Mch.

(8) To S. H. Phelan, Atlanta, Ga.:

Close hundred barrels May pork. Continue instructions remainder. Sell fifty bags June coffee all to-day's close. Close four thousand bushels short May wheat, if reaches eighty-two three-quarters or eighty.

C. H. COTHRAN & Co."

"The case was taken by appeal to the Superior Court. On the trial there the plaintiffs introduced the original tele-

gram, copied above. Also James Cothran, one of the plaintiffs, who testified, in substance, as follows: The telegram was given by him to an operator of defendant on the day it bears date, for transmission to Phelan, but was not properly sent. Plaintiffs were damaged in this way: On March 4, 1887, they sold fifty bags of coffee at 12 1-2 cents per pound, and on March 10, 1887, it had advanced to .1295, so they wished to sell fifty bags more, and sent the telegram. The defendant omitted the word 'sell,' and the word 'close' included the coffee also, so that, instead of having fifty bags of coffee sold, fifty bags were closed out. The actual loss on the coffee by this transaction was \$32.50, besides \$10 paid for commissions, and 37 cents for the telegram, and all this loss occurred because of the error in sending the telegram. Plaintiffs did not know of the error until about March 16th, 1887, for though they received the advice about Phelan closing instead of selling before that time, they supposed it was an error which had occurred in Phelan's office and which he would be responsible for. Witness does not remember what changes there were in the market then, as sometime had elapsed and prices may have fluctuated wildly. As soon as plaintiff, found out certainly, they took action to correct the mistake; and they were damaged as above stated. This loss was charged to their account. Does not remember whether Phelan failed soon after, but he owed them money when he did fail. As to settlements with Phelan, every night plaintiffs would run up their account and would see what the state of it was, and if he owed them they would draw on him, and if they owed him they would remit, daily if necessary. Never had any strictly money transactions with Phelan, for everything done was by draft; it was the same thing as money.

This matter was balanced in their books long before Phelan failed. Their transactions with him in two days would have been more than enough to wipe out this transaction, being for frequently \$2,500.00 per day.

It was admitted that a demand had been made on the

proper representatives of the defendant for the amount claimed by plaintiffs, according to law.

Defendant moved for a nonsuit, on the ground that the basis of the suit is a contract dealing in futures ; that there was no property in hand, and that it was to be settled by paying the difference when the day of judgment arrived ; insisting that it is a gaming contract, and that, under the law, there can be no recovery. The motion was sustained and the plaintiffs excepted.

C. Rowell, for plaintiffs.

Bigby & Dorsey and *H. M. Reid*, for defendant.

BLECKLEY, Chief Justice : The facts in detail will be found in the official report. It is quite apparent from the face of the dispatch, and from the evidence on the trial, that the transaction contemplated by the senders of the dispatch was a dealing in "futures." The court below, so construing the evidence, granted a nonsuit, and we are called upon to say whether that disposition of the case was correct. We think it was. It may be that, on account of the error in transmitting the dispatch, the plaintiffs would be entitled to recover what they paid for the transmission, — that is, the compensation the company received for the telegram ; but there is no indication in the record that the court below was called upon to decide this narrow question. On the contrary, the whole tenor of the record is to the effect that the plaintiffs claimed their full damages, and sought to measure the same by the market changes ; thus resorting to the fluctuations in "futures" in order to arrive at the amount of their recovery. We think this standard cannot be invoked, for the reason that contracts relating to "futures" are illegal, and we see not how an illegal contract can be called in to measure the damages sustained by reason of the breach of a legal contract. It is true that according to the *Telegraph Co. v. Blanchard*, 68 Ga. 299, a recovery in this case might be had ; but that decision was made at a time when contracts between brokers and their principals were considered obligatory, notwithstanding the vitiating element of speculation "futures ;" but since the

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case of *Bank v. Cunningham*, 75 Ga. 366, the principle of the former case has stood virtually overruled. Besides, the question in 68 Ga. related to a broker in the State of New York, whereas the broker in the present case was located in this State. His contract with the principal was a Georgia contract. We think the court did not err in granting a nonsuit. *Melchert v. Am. Un. Tel. Co.*, 11 Fed. Reporter, 193, and notes.

Judgment affirmed.

NOTE.— In addition to this and the two preceding cases, see the following Georgia cases in vol. 1, upon the liability of telegraph companies as carriers of messages: *W. U. Tel. v. Fontaine*, p. 229; *W. U. Tel. Co. v. Blanchard*, p. 404; *W. U. Tel. Co. v. Fatman*, p. 666; *W. U. Tel. Co. v. Shotter*, p. 657; *W. U. Tel. Co. v. Cohen*, p. 670.

See INDEX to this and to previous volume, title "Damages."

THE WESTERN UNION TELEGRAPH COMPANY v. L. W. DU
BOIS.

Illinois Supreme Court, April 5, 1889.

(128 ILL. 248.)

ERROR IN TELEGRAMS.—RIGHT OF ADDRESSEE.—DAMAGES.—FORM OF
ACTION.

By an error in transmitting a telegram, an offer to sell apples at \$1.75 per barrel was made to read \$1.55.

Held, that while in a proper action and before the proper tribunal the difference in price would measure the damage which the receiver could recover of the company, there being no contractual relation between the receiver and the company, his remedy was in tort, and a justice of the peace, before whom the action was brought, was without jurisdiction. Cases of this series cited in opinion: *W. U. Tel. Co. v. Tyler*, vol. 1, p. 115; *Tyler v. W. U. Tel. Co.*, vol. 1, p. 14.

APPEAL from a judgment of the Appellate Court, Third District, reversing a judgment of the Circuit Court, in

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favor of the plaintiff and for one cent damages, in an action originally brought before a justice of the peace.

Gross & Broadwell, for the appellant.

Tipton & Moffett, for the appellee.

Mr. Justice MAGRUDER delivered the opinion of the court :

In the fall of 1887 appellee kept a restaurant and hotel in Gibson, Ill. He had bought a car-load of apples at some time during the fall, from I. H. Moore of North Java, N. Y., at \$1.50 per barrel. About October 1, 1887, he wrote a letter to Moore, asking if another car-load could be furnished at the same price. On October 5, 1887, Moore answered the letter by sending a telegram. The telegram so sent, when received by appellee, read as follows :

“ Letter received. Can load car-load of best winter fruit at \$1.55.—
Answer.”

Appellee replied on the same day that he would accept the offer contained in the telegram, and sent Moore a draft for \$200 to apply on the purchase, Moore requiring such a deposit to insure the consummation of the bargain.

The telegram, as delivered by Moore to the appellant company for transmission to the appellee, read as follows :

“ Letter received. Can load car-load of best winter fruit at \$1.75.—
Answer.”

The error by which the figures were made to read \$1.55 instead of \$1.75 was the fault of appellant. Appellee did not discover the mistake until after the \$200 had been paid, and after Moore had shipped the apples. When the car arrived at Gibson, it contained 187 barrels of apples, which were green fruit. Moore sent to the bank at Gibson a draft for the balance of the purchase price at \$1.75 per barrel with the bill of lading attached. The bill of lading

was to be delivered to appellee upon payment of the draft, so that appellee could not get the bill of lading, or possession of the apples, without paying the draft. Thereupon he paid the draft, which, with the amount previously paid, was 20 cents per barrel more than the price at which he had bought the apples, as stated in the telegram received and acted upon.

Appellee brought this suit before a justice of the peace for damages resulting to him from the mistake of the appellant in transmitting the message, and recovered \$37.40, being 20 cents per barrel on the 187 barrels. On appeal to the Circuit Court, where the trial was had before the court without a jury, judgment was entered in favor of appellee for one cent damages. Both parties excepted to the judgment of the Circuit Court, and prayed an appeal to the Appellate Court, where errors were assigned on both sides. The Appellate Court reversed the judgment of the Circuit Court upon the cross-errors assigned by the appellee, and remanded the cause. Thereupon appellant made a motion to modify the judgment of reversal so as to make said judgment final, and with directions to the Circuit Court to render judgment against appellant for \$37.40 and costs, which motion was allowed, and judgment entered accordingly. Upon petition by appellant, the Appellate Court granted a certificate that the case involves questions of law of such importance, on account of collateral interests, as that the same should be passed upon by the Supreme Court, and allowed an appeal to this court.

In England the doctrine is that the receiver of a telegraphic dispatch can not sue the telegraph company, on the ground that the obligation of the company springs entirely from contract, and that the contract for the transmission of the message is with the sender of it. This doctrine, however, has never prevailed in the United States. Here it is well settled that the receiver of the dispatch may maintain an action against the telegraph company, through whose negligence the message has been altered or changed, for such loss or damage as he has sustained by reason of having

been led to act upon the dispatch. Proof of the alteration or change is *prima facie* evidence of the negligence of the company. The burden rests upon the company to show that the error was caused by some agency for which it is not liable. *Western Union Telegraph Co. v. Tyler et al.*, 74 Ill. 168. There is no doubt that appellee has a right of action against appellant under the facts above stated. The only question is as to the form of the action.

If the action must be in tort or case, this suit was improperly brought before a justice of the peace, because under our statute, justices of the peace have no jurisdiction in actions on the case for such an injury as is here involved.

The original contract for the transmission of the message was made between Moore and the company. It does not appear, however, that there was any contract, express or implied, between appellee and the company, nor was there any contract relation of any kind between them. Under some of the authorities, where the sender of the dispatch is the agent of the party to whom it is sent, or where the contract between the sender and the company is for the benefit of the party to whom the message is sent, the latter may sue the company in assumpsit. But, here, the relation between Moore and the appellee was that of vendor and vendee. Moore wanted to sell his apples, and the proof shows that he paid for the telegram himself. He made the contract with the company for the transmission of the message in his own interest, and to effect a sale of his own property. We do not think, therefore, that appellee was entitled to bring against the company any action based upon the existence of a contract relation between him and the company. His remedy is in tort.

Telegraph companies are the servants of the public, and bound to act whenever called upon, their charges being paid or tendered. They are in that respect like common carriers, the law imposing upon them a duty which they are bound to discharge. The extent of their liability is to transmit correctly the message as delivered. *Tyler et al. v. Western Union Telegraph Co.*, 60 Ill. 421. Hence, when

the receiver of a dispatch suffers loss from the careless and negligent performance of its duty by such a company, he is entitled to recover damages for the tort, and the proper remedy is in an action on the case.

The damages in such case should be for an amount which will compensate the plaintiff for his actual loss. They must be in satisfaction of the natural and proximate consequence of the defendant's act. In the present suit appellee would not have bought the apples if he had known that their price was \$1.75 per barrel. The facts — that he did not discover the mistake until after the apples had been shipped; that he had already advanced \$200 towards their purchase; that he could not obtain possession of them without paying the balance of the purchase price at the rate of \$1.75 per barrel; that they were perishable property, liable to be lost by the natural process of decay, if the delay in unloading them should be too great, and that appellee needed them in his business, having already disposed of a car-load on hand in order to make room for the present consignment—authorized him to pay the extra 20 cents per barrel, and look to the appellant for reimbursement. He was justified in relying upon his own judgment to make the loss as small as possible. Under the circumstances, as thus detailed, his judgment was a reasonable one.

We think the Appellate Court did right in fixing the amount of damages at \$37.40. But the distinctions between common law actions are still recognized in this State. The jurisdiction of justices of the peace is, in large measure, based upon and limited by such distinctions. It is our duty to recognize them. Inasmuch, therefore, as appellee has pursued the wrong remedy, and before the wrong tribunal, the judgment must be reversed.

Judgment reversed.

NOTE.—Upon the subject of the liability of telegraph companies as carriers of messages, the State of Illinois is barely represented in this volume.

The following cases are in vol. 1: *Tyler v. W. U. Tel. Co.*, p. 14; *W. U. Tel. Co. v. Tyler*, p. 115; *Logan v. W. U. Tel. Co.*, p. 235; *W. U. Tel. Co.*

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v. *Martin*, p. 378 ; *Pope v. W. U. Tel. Co.*, pp. 367, 715 ; *W. U. Tel. Co. v. Hope*, p. 435 ; *W. U. Tel. Co. v. Fairbanks*, p. 699 ; *W. U. Tel. Co. v. Valentine*, p. 829 ; *W. U. Tel. Co. v. Harris*, p. 839 ; *Rains v. W. U. Tel. Co.*, p. 864.

In *W. U. Tel. Co. v. DeGolyer*, 27 Ill. App. 489 (1888), the head note is as follows :

"In an action against a telegraph company to recover damages for a failure to send a telegram, it is *held*, that the question whether the plaintiff assented to a printed clause in the blank used requiring claims for damages to be presented within 60 days, and whether the claim was presented within the time so limited, were for the jury ; and that although the verdict appears to be evasive, this court cannot reverse on that ground, as the question was not raised in the court below."

See note to *W. U. Tel. Co. v. Longwill*, *post*.

WESTERN UNION TELEGRAPH COMPANY v. E. H. KINNEY.

Indiana Supreme Court, May 24, 1886.

(106 Ind. 468.)

INDIANA PENAL STATUTE.—RIGHTS OF ADDRESSEE.

Only the sender of a dispatch can recover the penalty imposed by section 4176, Indiana R. S., 1881, for failure to transmit ; and the fact that the failure was to re-transmit the message from its original receiving office, at the order of the agent of the receiver, does not make the agent the sender so as to confer a cause of action upon his principal, the addressee. Cases of this series cited in opinion : *W. U. Tel. Co. v. Pendleton*, vol. 1, p. 632 ; *W. U. Tel. Co. v. Reed*, vol. 1, p. 657 ; *W. U. Tel. Co. v. Axtell*, vol. 1, p. 295 ; *W. U. Tel. Co. v. Trissal*, vol. 1, p. 682.

APPEAL by the defendant below from a judgment of Bartholomew Circuit Court, awarding the plaintiff the statutory penalty of \$100 for failure to transmit a telegram. Facts stated in opinion.

J. E. McDonald, J. M. Butler, A. L. Mason and H. L. Gordon, for appellant.

J. C. Orr, for appellee.

Telegraph Company v. Kinney.

NIBLACK, J: This was a suit by Emanuel H. Kinney against the Western Union Telegraph Company, to recover a penalty of one hundred dollars, under the provisions of section 4176, R. S., 1881, for the alleged failure of the company to transmit a dispatch as it was required by law to do.

The complaint charged that the defendant was, at the time it was filed, engaged in telegraphing for the public, and had a line of telegraphic wires partly within the State of Indiana, which extended from the city of Columbus, in said State, to Hillsdale, in the State of Michigan; that the plaintiff, on the 21st day of December, 1884, intending to be absent on business from his home in said city of Columbus, directed and instructed his clerk and agent, engaged and employed in his office in said city, to telegraph to him at Hillsdale, in said State of Michigan, any message for him that might be delivered to such clerk and agent at Columbus aforesaid during the following day; that during the said last named day, that is to say, on the 22nd day of December, 1884, the following telegraphic message was delivered at the plaintiff's office, at the city of Columbus:

“ALBION, Michigan, December 22nd, 1884.

“*To E. H. Kinney, Columbus, Indiana:* Yes; if not number one must stand shrinkage. Pay first April. Can not meet you.

“A. J. BAILY & SON.”

That upon the delivery of said message to the plaintiff at his office, in Columbus, he, by his clerk and agent aforesaid, at that place, took and delivered to the defendant, during the usual business hours, at its office, in said city of Columbus, a message as follows, which it, the defendant, received and agreed to transmit to the plaintiff's temporary residence, at Hillsdale, in the State of Michigan, to wit:

COLUMBUS, Ind., December 22nd, 1884.

“*To E. H. Kinney, Hillsdale, Michigan:* Yes; if not number one must stand shrinkage. Pay first April. Can not meet you.

“A. J. BAILY & SON.”

That the plaintiff paid to the defendant the usual and required charge, to wit, the sum of seventy-three cents, for the transmission of said last named message to his address at Hillsdale, Michigan, aforesaid, but that the defendant wholly failed and neglected to transmit said message as the plaintiff had addressed the same, and wholly failed and neglected to transmit said message to said Hillsdale, in the State of Michigan, on said 22nd day of December, 1884, or at any time thereafter.

A demurrer to the complaint being first overruled, the jury, under the direction of the Circuit Court, returned a special verdict, upon which a judgment was rendered against the defendant for the penal sum of one hundred dollars.

Error is first assigned upon the overruling of the demurrer to the complaint. The most important objection urged against the sufficiency of the complaint is, that it is only the sender of a telegraphic message who can recover the penalty prescribed in section 4176, R. S., 1881, herein above referred to, and that, upon the facts charged, the plaintiff was in no sense the sender of the message which the defendant failed and neglected to transmit to him at Hillsdale.

It was held by this court in the carefully and very elaborately considered case of *W. U. Tel. Co. v. Pendleton*, 95 Ind. 12; 48 Am. R. 692, that it was only the sender of a message who can recover the penalty provided by the section of the statute upon which this action is based; and the doctrine of that case was, as we believe, rightfully reaffirmed in the subsequent case of *W. U. Tel. Co. v. Reed*, 96 Ind. 195. In regard, therefore, to the parties to an action like this, the construction given as above to the section in question may now be accepted as an authorized and well established construction, resting upon competent authority. With this construction in view, we know of no principle upon which it can be said that the plaintiff was the sender of the message which his clerk and agent

directed should be forwarded to him from Columbus to Hillsdale.

The message was substantially the same message which A. J. Baily & Son had sent to the plaintiff in the first instance, with only the address as to the place of destination changed by his authority and direction. It continued, as it was from the first, to be a message from Baily & Son to the plaintiff, and the relations of Baily & Son to the message, as the persons who sent it, and who were alone responsible for its contents, were not changed by the new address which was attached to it. The plaintiff was the receiver of the message at Columbus, and, in legal contemplation, would have been its receiver, and its receiver only, if it had reached him at Hillsdale.

The transaction described in the complaint, when briefly summarized, means that a message sent to the plaintiff to Columbus was by his authority ordered to be forwarded to him at Hillsdale, which was not done by reason of some failure or neglect on the part of the defendant. This ordering a message to be forwarded was in no respect the sending of a message by the plaintiff, within the meaning of the statute, and the averment of the complaint that it was such a sending was a mere conclusion of law, inconsistent with the facts relied upon for its support. A complaint to recover a statutory penalty must aver facts which bring the case presented by it within both the letter and the spirit of the statute. *W. U. Tel. Co. v. Axtell*, 69 Ind. 199.

Whether the defendant may not have incurred a liability to the plaintiff under section 4177, R. S., 1881, is a question not now before us, and which consequently has not been considered at the present hearing. That might depend upon additional facts not contained in the complaint now under consideration. *W. U. Tel. Co. v. Trissal*, 98 Ind. 566.

Other objections are urged to the sufficiency of the complaint, as well as to several points in the proceedings at the trial, but as the judgment will in any event have to be reversed for want of a sufficient complaint, we need not further extend this opinion.

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The judgment is reversed, with costs, and the cause remanded for further proceedings.

NOTE.— This case is cited in the following cases, *post* : *W. U. Tel. Co. v. Wilson* ; *W. U. Tel. Co. v. Brown*.

For other cases upon the right of the addressee of a telegram to sue the company in case of error, delay or failure to deliver, see INDEX to this and to previous volume, title, " Receiver or addressee."

See also note at vol. 1, p. 89.

The general rule is that the addressee has a right to an action for damages sustained by him, though different grounds are assigned therefor.

Under the Indiana statute which governed in the case above reported, it has been uniformly held that the right to the penalty is in the sender only. *W. U. Tel. Co. v. Pendleton*, 1 Am. Elec. Cas. 632 ; *W. U. Tel. Co. v. Reed*, *id.* 657. The reversal of the Pendleton case by the Supreme Court of the United States was upon another point.

See notes to *W. U. Tel. Co. v. McKibben*, *post* ; *W. U. Tel. Co. v. Longwill*, *post*.

WESTERN UNION TELEGRAPH COMPANY V. ALONZO F
BROWN.

Indiana Supreme Court, Sept. 15, 1886.

(108 Ind. 538.)

INDIANA PENAL STATUTE.—EFFECT OF REPEAL.—RIGHT OF ADDRESSEE

Section 4176, R. S., 1881, was repealed by acts 1885, p. 151 ; but such repeal did not affect a case where the penalty had accrued prior to the passage of the repealing act.

The initials affixed to the signature to the telegram were not those of the plaintiff ; and though it was found as a fact by the trial court that the plaintiff presented the dispatch for transmission, he was not identified with the sender.

Held, that the penalty enured only to the sender, and the burden was on the plaintiff to show that he was the sender, failing in which, the judgment in his favor was reversed.

Cases of this series cited in opinion : *W. U. Tel. Co. v. Pendleton*, vol. 1, 632 ; *W. U. Tel. Co. v. Reed*, vol. 1, p. 657 ; *W. U. Tel. Co. v. Kinney*, *ante*, p. 504.

APPEAL from judgment of Vigo Circuit Court, awarding statutory penalty for delay of telegram.

The facts are stated in the opinion.

J. E. McDonald, J. M. Butler and A. L. Mason, for appellant.

S. C. Stimson and R. B. Stimson, for appellee.

ZOLLARS, J.: Appellee was awarded judgment below against appellant for the statutory penalty as provided by section 4176, R. S., 1881, being section 1 of an act passed in 1852, for a failure to transmit a message in proper time.

Appellant's counsel contend that the act of 1885, acts 1885, p. 151, by implication, repealed the above section of the act of 1852, and that that repeal took away all right to the penalty, although a penalty in a like amount is provided by the act of 1885 for a violation of its provisions.

Section 4176, *supra*, reads as follows :

“ Every electric telegraph company with a line of wires wholly or partly in this State, and engaged in telegraphing for the public, shall, during the usual office hours, receive dispatches, whether from other telegraphic lines or from individuals ; and, on payment or tender of the usual charge, according to the regulations of such company, shall transmit the same with impartiality and good faith, and in the order of time in which they are received, under penalty, in case of failure to transmit, or if postponed out of such order, of one hundred dollars, to be recovered by the person whose dispatch is neglected or postponed: *Provided, however*, That arrangements may be made with the publishers of newspapers for the transmission of intelligence of general and public interest out of its order, and that communications for and from offices of justice shall take precedence of all others.”

The act of 1885 is as follows :

“ An act prescribing certain duties of telegraph and telephone companies prohibiting discrimination between patrons, providing penalties therefor, and declaring an emergency.

“ Section 1. *Be it enacted*, * * * That every telegraph company with a line of wires wholly or partly within this State, and engaged in doing a general telegraphic business, shall, during the usual office hours, receive dispat-

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ches, whether from other telegraph lines or other companies, or individuals, and shall, upon the usual terms, transmit the same with impartiality, and in good faith, and in the order of time in which they are received, and shall in no manner discriminate in rates charged or words or figures charged for, or manner or conditions of service between any of its patrons, but shall serve individuals, corporations, and other telegraphic companies with impartiality: *Provided, however,* That arrangements may be made with the publishers of newspapers for transmission of intelligence of general and public interest out of its order, and that communications for and from officers of justice shall take precedence of all others. * * *."

"Sec. 8. Any person or company violating any of the provisions of this act shall be liable to any party aggrieved, in a penalty of one hundred dollars for each offence, to be recovered in a civil action in any court of competent jurisdiction: *Provided,* Nothing in this act shall be construed to take away or abridge the right of such aggrieved party to appeal to a court of equity to prevent such violations or discriminations by injunction or otherwise."

In our judgment, this later act operated as a repeal of the above section 4176. The title is comprehensive, and clearly indicates an intention on the part of the Legislature to revise the whole subject of penalties against telegraph companies for a failure to transmit messages promptly, and with impartiality.

The act also covers the whole subject-matter, is different and more comprehensive in its terms than section 4176, and contains provisions not found in that section, and that are not reconcilable therewith. When such is the case, the later act repeals the former upon the same subject. *State v. Christman*, 67 Ind. 328, and cases there cited; *Lindsay v. Lindsay*, 47 Ind. 283; *State v. Horsey*, 14 Ind. 185; *De Pauw v. City of New Albany*, 22 Ind. 204; *Coghill v. State*, 37 Ind. 111; *Dowdell v. State*, 58 Ind. 333; *Hayes v. State*, 55 Ind. 99; *Wright v. Wright*, 97 Ind. 444; *State, ex rel. v. Board, etc.*, 104 Ind. 123; *Hadley v. Musselman*, 104 Ind. 459.

Section 4176 required that messages should be transmitted promptly and with impartiality, whether received from other telegraph companies or from individuals, but the penalty was only for a failure to transmit the message or the postponing of it out of its order. It also provided that the

penalty might be recovered by the person whose dispatch was neglected or postponed.

The act of 1885 provides that messages shall be transmitted promptly and with impartiality, whether received from other telegraph lines or other companies, or from individuals, and that the company “*shall in no manner discriminate in rates charged or words or figures charged for, or manner or condition of service between any of its patrons.*” It further provides that any *person* or company violating *any of the provisions* of the act shall be liable to *any party aggrieved* in a penalty of \$100 for each offense, etc. The portions above italicized show the difference between the two acts.

In the act of 1852, section 4176, *supra*, the penalty, as we have seen, is alone for the failure or delay in the transmission of the message.

In the act of 1885 the penalty may be recovered also for any forbidden discrimination. The act of 1852, section 4176, *supra*, as interpreted by this court, gave a right of action for the penalty to the sender of the dispatch only. *W. U. Tel. Co. v. Pendleton*, 95 Ind. 12; *W. U. Tel. Co. v. Reed*, 96 Ind. 195; *W. U. Tel. Co. v. Kinney*, 106 Ind. 468.

Whether or not the act of 1885, by the use of the term “party aggrieved,” extends the right to the penalty to any one except the sender of the dispatch, is a question we need not here decide.

The message which gave rise to this action was delivered to the company on the 2nd day of December, 1883. The action was commenced in December, 1884, and tried in July, 1885. It will thus be seen, that the action is to enforce a penalty incurred, if at all, under the above section 4176, and that the action was pending when the act of 1885 took effect, on the 8th day of April, 1885.

There is no vested right in a penalty. The general rule is, that an action can not be maintained to recover a penalty after the act giving it is repealed, unless it be saved by the repealing act. *Thompson v. Bassett*, 5 Ind. 535. There is

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no such saving clause in the act of 1885. It does not follow, however, that appellee's right of action for the penalty was lost with the repeal of section 4176. In 1877 an act was passed, the first section of which, among other things, provided as follows :

" And the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability." R. S., 1881, sec. 248.

This statute clearly applies in the case before us. Whatever rights appellee may have had to the penalty under section 4176, therefore, are saved to him by this statute. For the purposes of this action in the recovering of that penalty, section 4176 is to be regarded as still in force. The court, therefore, did not err in overruling the demurrer to appellee's complaint.

As appellee must recover the penalty, if at all, under section 4176, it follows that it must be made to appear that he was the sender of the dispatch within the meaning of that section as heretofore interpreted by this court — that is, it must appear that it was a message from him to some other person.

At the request of the appellant, the trial court disposed of the case by a special finding of facts and conclusions of law thereon. The finding of facts, as to appellee's connection with the dispatch, is as follows :

"That on said December 2nd, 1883, the plaintiff delivered to the agent of the defendant, at said Union depot office, in Terre Haute, Indiana, for transmission to Crawfordsville, the following message, to-wit :

" December 2nd, 1883.

"*To T. D. Brown, Crawfordsville:* Please tell Dr. Brown, of Alamo, immediately, that Duck is dead ; died at ten this morning ; be home 3rd, on morning train. Have Frank Snyder at the Logansport depot with hearse and one cab for Alamo.

" L. F. BROWN."

“That, at the time said message was delivered, the plaintiff paid to said agent the sum of eighty cents, being the amount demanded by said agent for sending said message,” etc.

This is not a finding that appellee was the sender of the dispatch. It is found that he delivered the dispatch to the company, and paid for the transmission, but that is not a finding that the dispatch was from him to T. D. Brown. He may have delivered the dispatch to the company, and paid for its transmission with his own money, and yet not be the sender of it, in the sense of the statute. *W. U. Tel. Co. v. Kinney, supra.*

The dispatch set out as a part of the special finding is signed “L. F. Brown,” and there is no finding that the signature is that of appellee, Alonzo F. Brown. It is by no means a necessary inference from the facts found that appellee was the sender of the dispatch. The burden was upon him to show that the dispatch was a message from him; and, in order that he may recover upon the facts specially found, they must affirmatively show what he was thus bound to prove.

“It is now well settled that, where the finding is silent upon a material point, it is to be deemed to be adverse to the party upon whom rests the burden of establishing that point.” *Dodge v. Pope*, 93 Ind. 483.

“Under the rule declared in *Graham v. State, ex rel. &c.*, 66 Ind. 386, the special finding must be deemed to embrace all the facts which were proved, and all issues not determined by the facts found must be regarded as not proven by the party having the burden of the proof thereof.”

Vannoy v. Duprez, 72 Ind. 26. See also, *First Nat. Bank v. Carter*, 89 Ind. 317; *Dixon v. Duke*, 85 Ind. 434; *Johnson v. Putnam*, 95 Ind. 57; *Hedges v. Keller*, 104 Ind. 479; *Bass v. Elliott*, 105 Ind. 517; *Glantz v. City of South Bend*, 106 Ind. 305.

“Where the special finding is silent as to facts which a party is required to affirmatively establish, it will be pre-

sumed, on appeal, that the evidence failed to establish such facts. *Mitchell v. Colglazier*, 106 Ind. 464.

We have no means of knowing what the evidence may have been. If, in fact, the evidence showed that appellee was, in the sense of the statute, the sender of the dispatch, he should have seen to it that the fact was specially found, and definitely and affirmatively stated. As the special finding of facts does not show that appellee was the sender of the dispatch, the conclusion of law, and the awarding of judgment for the penalty in his favor, by the court below, are erroneous, and the judgment must be reversed.

ON PETITION FOR A REHEARING.

Per CURLAM: In reversing the judgment, an order was made directing the court below to change its conclusions of law, and render judgment for appellant on the special finding of facts.

After considering the petition for a rehearing we have reached the conclusion that the rights of the parties will be better protected by changing the mandate, and ordering that the judgment be reversed, at appellee's costs, and that the cause be remanded, with instructions to the court below to grant a new trial to appellee, if moved for; otherwise to render judgment for appellant upon the special finding of facts. This we have authority to do. *Parker v. Hubbell*, 75 Ind. 580; *Yerks v. Sabin*, 97 Ind. 141 (144); *Shannon v. Hay*, 106 Ind. 589.

It is so ordered.

Filed Nov. 22, 1886; motion to modify mandate overruled Feb. 24, 1887.

NOTE.—See note to preceding case, also notes to *W. U. Tel. Co. v. McKibben*, *post*; *W. U. Tel. Co. v. Longwill*, *post*.

This case is cited in the following cases in this volume: *W. U. Tel. Co. v. Wilson*; *W. U. Tel. Co. v. Steele*.

See INDEX to this and to preceding volume, title "Receiver or addressee."

WESTERN UNION TELEGRAPH CO. v. THOMAS B. BUSKIRK.*Supreme Court of Indiana, Oct. 6, 1886.*

(5 West. Rep. 871.)

INDIANA STATUTE.—PLEADING.

In an action for the penalty provided by R. S., 1881, sec. 4176, it is unnecessary to aver in the complaint that the addressee lived within the territory requisite to make the statute applicable. It is for the company to excuse itself by alleging and proving the negative.

A telegraph company having received a telegram for transmission written at the office by another than the sender, without objection, and having been paid for the transmission, cannot be heard to say that the person presenting the telegram was not authorized so to do by the plaintiff, whose name was signed to the message.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Lindley*, vol. 1, p. 275; *W. U. Tel. Co. v. Gougar*, vol. 1, p. 412.

Louden & Miers, for appellant.

John W. Buskirk, for appellee.

MITCHELL, J., delivered the opinion of the court:

The appellee recovered a judgment against the appellant for \$100, the statutory penalty for an alleged failure to transmit a telegraphic message according to the provisions of Rev. Stat. 1881, § 4176.

The default charged was the neglect to transmit a message delivered to the appellant's agent at Orleans, Indiana, on the 5th day of November, 1884, by the appellee, and directed to John W. Buskirk, at Bloomington, Indiana. The sufficiency of the complaint is questioned, because it omits to aver that John W. Buskirk resided within one mile of the telegraphic station to which the message was directed, or within the city or town in which such station is situate.

This precise point was presented, and decided adversely to the appellant in *Western Union Tel. Co. v. Lindley*, 62 Ind. 371. Facts which go to excuse the failure to transmit a message delivered during usual office hours, according to the regulations of the company, must come from the defense. *Western Union Tel. Co. v. Gougar*, 84 Ind. 176.

The evidence tended to show that the appellee made a memorandum of the message alleged to have been delivered for transmission on a scrap of paper and directed another, to whom he delivered the paper, with the money to pay the charge for transmission, to go to appellant's office, transcribe the message upon one of the company's blanks, and deliver it, prepaid, for transmission.

There was evidence tending to show that the person thus authorized went to the telegraph office, and upon one of the company's blanks furnished him by its agent wrote a telegram according to the memorandum given him, addressing it properly, to which he signed the appellee's name. It is insisted that it does not appear that the person thus authorized had authority to affix the appellee's signature to the message, and that, if he was authorized, he must have signed it in the character of an agent.

The jury were justified in finding from the evidence that the signature of the appellee was duly authorized. The company's agent having received the message and the money for its transmission without objection, it is not in a position to raise any question with the appellee, either as to the authority of the person who signed his name, or concerning the manner or character in which it was signed. The message was properly directed, and sufficiently indicated on its face who the sender was. Having been received for transmission without objection, the other parties interested being content, it is not for the company now to question the authority of the person who signed for the appellee. Thousands of messages are received for transmission by telegraph companies which are communicated to them orally by the senders, which the company's agents write out and sign by the implied authority of the sender.

If they are so received, they are messages to be transmitted subject to all the liability imposed by law.

The question sharply contested at the trial was whether or not the message, with the money for its transmission, was delivered at all. The appellee's messenger testified positively that he transcribed and delivered the message, signed the appellee's name to it, and paid the appellant's agent thirty-five cents for its transmission. The appellant's agent was equally emphatic in asserting that neither message nor money was delivered. To some extent both were corroborated. It, therefore, became a question eminently fit for the determination of the court and jury trying the cause. Having determined it, we cannot, under the rule of this court, interfere with their conclusion.

The third instruction given by the court is the subject of criticism by the appellant. In this instruction the jury were told in substance that if the appellee delivered the message described in the complaint to the defendant's agent at the time and place therein mentioned, and paid the charges demanded for its transmission, and the defendant wrongfully failed and refused to transmit the message, etc., their verdict should be for the plaintiff.

Counsel challenge this instruction because, as they urge, the court undertook to recite the particular facts which would authorize the jury to find for the plaintiff, and in so doing omitted to state all the facts essential to a recovery. To have entitled the plaintiff to a verdict, it must have appeared that the defendant was engaged in telegraphing for the public, and that the message was delivered to it during usual office hours.

The jury were told that if certain facts were proved in respect to the delivery of the message, and the defendant wrongfully failed to transmit it, a recovery would be justified. No attempt was made in the instruction in question to define the circumstances under which a failure to transmit would have been wrongful. This was adequately done in other instructions. The question is, therefore, brought within the rule, often repeated, that where an instruction

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states the law correctly so far as it goes, but is incomplete, it may be completed by another which supplies the defect. *Binns v. State*, 66 Ind. 428; *Achey v. State*, 64 Ind. 56.

If the appellant was not, at the time the message was delivered to it for transmission, engaged in telegraphing for the public, or if the message was delivered at any other than usual office hours, the failure to transmit was not wrongful, and substantially to this effect the jury were instructed in other instructions given by the court. Taken together, the instructions fairly presented the law of the case. The objections which are made to an instruction, covering the subject of the authority to sign the appellee's name to the message in question, have been sufficiently remarked upon by what has already been said. The admission of testimony in corroboration of evidence given by the principal witness for plaintiff, as part of the latter's case in rebuttal, is complained of. The order in which evidence, otherwise competent, is admitted is so much a matter within the discretion of the court trying the cause that unless a clear case of abuse is presented we should not feel justified in reversing a cause. The record before us does not present such a case. We find no error.

Judgment affirmed, with costs.

NOTE.—See note to *W. U. Tel. Co. v. McKibben*, *post*.

Western Union Telegraph Company v. Wilson.

WESTERN UNION TELEGRAPH COMPANY v. WILSON.

Indiana Supreme Court, Nov. 23, 1886.

(108 Ind. 308.)

INDIANA PENAL STATUTE.

A telegraph company had two offices in the same town, from only one of which messages could be sent directly to a certain place.

The plaintiff presented a telegram for transmission to said place, at the other telegraph office, at the same time tendering the usual fee. He was told by the agent that it would not be sent from that office, but should be taken to the other, from which it would be sent directly to its destination. The agent also offered to take or send it to the other office. The plaintiff then took the message to the other office, from which it was promptly transmitted.

Held, that no case was established entitling the plaintiff to the statutory penalty provided by section 4176, Indiana Revised Statutes, 151, which was in force at the time of the transaction, in December, 1884.

Held, also, that although said statute was repealed by acts 1885, p. 151, still the repeal did not release or extinguish any penalty incurred thereunder.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Brown*, ante, p. 508; *W. U. Tel. Co. v. Axtell*, vol. 1, p. 295; *W. U. Tel. Co. v. Mossler*, vol. 1, p. 645; *W. U. Tel. Co. v. Kinney*, ante, p. 504; *W. U. Tel. Co. v. Harding*, vol. 1, p. 814; *Julian v. W. U. Tel. Co.*, vol. 1, p. 678; *W. U. Tel. Co. v. Meredith*, vol. 1, p. 643; *W. U. Tel. Co. v. Jones*, vol. p. 561; *Rogers v. W. U. Tel. Co.*, vol. 1, p. 388; *Carnahan v. W. U. Tel. Co.*, vol. 1, p. 523.

ACTION for statutory penalty. Appeal from Circuit Court, Monroe county. The facts are stated in the opinion.

J. H. Loudon and *R. W. Miers*, for appellant.

J. W. Buskirk and *H. C. Duncan*, for appellee.

ZOLLARS, J.: The evidence establishes the following facts: In December, 1884, appellant, the Western Union

Telegraph Company, had two offices in the town of Gosport, in this State, situated about eighty yards apart, one on the Indianapolis & Vincennes Railroad, called the upper office, and one on the Louisville, New Albany & Chicago Railroad, called the lower office. It had a line of wire along the line of each of said railroads. That along the line of the Louisville, New Albany & Chicago Railroad led direct from Gosport to Bedford, in this State. Over that line a message could be sent direct from Gosport to Bedford without being repeated. The wire along the line of the Indianapolis & Vincennes Railroad led to Indianapolis. In order to get a message over that line from Gosport to Bedford, it would have been necessary to send it to Indianapolis, and there repeat it to Lafayette, New Albany, Greencastle, or Crawfordsville, and there again repeat it to Bedford.

At about 5 o'clock P. M. of the twenty-second day of December, 1884, appellee went to the upper office in Gosport, being that on the line of the Indianapolis & Vincennes Railroad, and wrote and presented to appellant's agent a message addressed to Capt. Friedley, at Bedford. The agent told him that the charge for transmitting the message would be 30 cents; that he would not transmit it from that office, and that he, appellee, would have to send it from the other office, being the lower office, on the line of the Louisville, New Albany & Chicago Railroad; that it would go direct from that office. Upon appellee saying that he was in a hurry, the agent told him that he could get a boy to take the message to the other office, and upon appellee saying that he would not do so, the agent told him that he would take it for him. At that time the message, and a half dollar of appellee's money, out of which he requested the 30 cents to be taken, were upon the counter. After the agent had declined to send the message from that office, and after the above conversation, appellee took the message and money from the counter, saying that he would sue the company, went to the other office, submitted the message, and paid the 30 cents, and at 15 minutes after 5 o'clock P.

M. of the same day the message had been transmitted and delivered to Capt. Friedley, at Bedford.

There is no conflict in the evidence as to the above stated facts. The agent at the upper office testified that, at the time he instructed appellee to go to the other office, he explained to him that, if sent from the upper office, the message would have to be forwarded to Indianapolis, and there be repeated to Lafayette or New Albany, and then again be repeated to Bedford.

That testimony was contradicted by appellee only indirectly, if, indeed, it was contradicted at all.

Upon the foregoing evidence the court below found for appellee, and awarded him the statutory penalty of \$100.

It will be observed that the wrong on appellant's part, if there was any wrong, as claimed by appellee, occurred in December, 1884, before the passage of the act of 1885, acts 1885, p. 151. It has been held that that act repealed section 4176, R. S. 1881, upon the same subject, but that such repeal did not release or extinguish any penalty incurred under that section. *W. U. Tel. Co. v. Brown*, 108 Ind. 538.

If, therefore, appellant was guilty of any wrong which under that section made it liable for the penalty therein provided, appellee may recover it in this action.

The section was as follows:

“ Every electric telegraph company with a line of wires wholly or partly in this State, and engaged in telegraphing for the public, shall, during the usual office hours, receive dispatches, whether from other telegraphic lines or from individuals; and, on payment or tender of the usual charge, according to the regulations of such company, shall transmit the same with impartiality and good faith, and in the order of time in which they are received, under penalty, in case of failure to transmit, or if postponed out of such order, of one hundred dollars, to be recovered by the person whose dispatch is neglected or postponed,” etc.

That statute was a penal one; and while it must be given a reasonable construction, so as to make it subserve the purpose for which it was enacted, it must yet be strictly construed. A party claiming under it must bring his case clearly within the letter and spirit of the act. *W. U. Tel.*

Co. v. Axtell, 69 Ind. 199; *W. U. Tel. Co. v. Mossler*, 95 Ind. 29; *W. U. Tel. Co. v. Kinney*, 106 Ind. 468; *W. U. Tel. Co. v. Harding*, 103 Ind. 505.

In the case of *W. U. Tel. Co. v. Axtell*, *supra*, it was said: "A court cannot create a penalty by construction, but must avoid it by construction, unless it is brought within the letter and the necessary meaning of the act creating it." See, also, *Burgh v. State, ex rel.*, 108 Ind. 132.

In construing statutes, the prime object is to ascertain and carry out the purpose of the Legislature in its enactment, and, while it is the duty of the court to yield to the words of the statute, still, in determining what meaning it was intended to have, it is proper to consider its spirit, the object it was intended to subserve, and the evils it was intended to remedy. Without doing violence to the language of the statute, the words will be so construed as to bring the operation of the act within the intention of the Legislature. It is said to be an established rule, applicable to the construction of remedial statutes, that cases not within the reason, though within the letter, shall not be taken to be within the statute. *Miller v. State, ex rel.*, 106 Ind. 415; *Stout v. Board, etc.*, 107 Ind. 343; *City of Evansville v. Summers* 108 Ind.: *Middleton v. Greeson*, 106 Ind. 18.

Doubtless there have been, and will hereafter be, many cases where it is important the messages shall be transmitted with impartiality and good faith, and where a failure in that regard will occasion but little pecuniary loss. The statute was intended to insure such good faith and impartiality in such and all other cases, and hence, without regard to the amount of loss that may be suffered by those interested in the message, a penalty, by way of punishment, is imposed for a failure of duty on the part of the telegraph company. While the penalty is a fixed one, and in no way affected by the amount of damages that may be suffered by any one interested in the message, it is manifest that where there has been no neglect of duty owing to such persons,

and no invasion of their rights, as such duties and rights are fixed by the statute, there can be no penalty.

A telegraph company cannot limit its liability for the penalty by contract, but if a case be such that, aside from such contract, those interested in the message cannot maintain an action for damages, either nominal or otherwise, it must be plain that the company can not be held for the penalty. It can not be punished for a neglect of duty where it owes no duty. It can not be punished for not doing that which it is under no obligation to do. This, we think, is clearly the proper construction of the statute, and is in consonance with former rulings by this court.

In the case of *Julian v. W. U. Tel. Co.*, 98 Ind. 327, in speaking of the above section 4176 of the statute, it was said: "The statute does not make mere delay a ground for recovery, but the dispatch must be wrongfully postponed, or, in the language of the statute, 'neglected,' or postponed in bad faith, or through partiality. Here, as we have seen, there was no bad faith, no partiality, no negligence, and therefore there was a transmission of the message within the meaning of the law."

Upon the grounds suggested it has been held that the telegraph company may stipulate that the claim for the penalty shall be presented within a reasonable time. *W. U. Tel. Co. v. Meredith*, 95 Ind. 93; *W. U. Tel. Co. v. Jones*, 95 Ind. 228 (48 Am. R. 713).

And so it has been held that an action for the penalty can not be maintained by a person who has delivered his dispatch for transmission and delivery on Sunday, for the reason that the penalty cannot be recovered for the failure to perform an illegal contract. *Rogers v. W. U. Tel. Co.*, 78 Ind. 169 (41 Am. R.). See, also, *Carnahan v. W. U. Tel. Co.*, 89 Ind. 526 (46 Am. R. 175).

In the case of *W. U. Tel. Co. v. Harding*, *supra*, it was held that under section 4176, *supra*, a telegraph company may regulate, reasonably, its office hours according to the requirements of the business at the various points where it holds itself out for public service, and that the penalty for

failing to seasonably transmit a message is not incurred, unless there is a failure to receive and transmit, during the usual office hours, both at the point where the message is received and that to which it is transmitted.

In short, the holding of these cases is, that the telegraph company can not be held liable for the penalty where it has not, by the violation of some right or the neglect of some duty (independent of some contract limiting its liability for damages), made itself liable to the sender of the message.

In the case before us, the evidence fails to show that the telegraph company violated any of appellee's rights or neglected any duty it owed to him. The message was promptly transmitted over the direct line from Gosport to Bedford, and promptly delivered to the person to whom it was addressed. To have sent it from the office on the Indianapolis & Vincennes Railroad would have been to take it from the direct line provided by the company, send it hundreds of miles around, and subject the company to the liability that might result from mistake in the two necessary repetitions of the message. Having the direct line of wire between Gosport and Bedford, being ready and willing to, and having promptly transmitted the message over that line, it would be unreasonable to hold the company liable to appellee for having declined to send it over the other indirect and roundabout line. It would be as much, if not more, unreasonable to punish the company by the infliction of the penalty of \$100 for having declined to do that which the appellee had no right to demand should be done. It was but a very short distance from one office to the other. The message was transmitted with less risk of mistake, and in less time, than it would have been possible to transmit it over the other line. To allow appellee to recover the penalty of \$100 under the facts and circumstances of the case would be, it seems to us, to turn the statute into an enginery of wrong and oppression.

We are not dealing with a question of conflict in the evidence, but there is here a total want of evidence to make

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a case against appellant under the statute. It results that the judgment must be reversed.

This conclusion makes it unnecessary to consider other questions discussed by counsel.

Judgment reversed, at appellee's costs, and cause remanded, with instructions to the court below to sustain appellant's motion for a new trial.

NOTE.— See note to next case.

WESTERN UNION TELEGRAPH COMPANY V. MARION
McKIBBEN.

Indiana Supreme Court, December 27, 1887.

(114 Ind. 511.)

DELAY OF TELEGRAM.— INDIANA STATUTE.— LIMITING TIME TO PRESENT
CLAIM.— DAMAGES.

An action for special damages will lie under section 4177, Indiana Revised Statutes, 1881, in favor of the person in whose behalf a telegram negligently delayed was presented for transmission, although he was neither sender nor addressee.

In such an action a condition in a telegraph blank limiting the time within which an action for damages may be brought, does not bind any one but the sender.

In such an action, a charge that the plaintiff was entitled to recover, if at all, the amount which he would have received for his services in the employment which he lost by the negligent act complained of, less the amount which he earned or might have earned by reasonable diligence in seeking other work, held sufficiently favorable to the company.

Certain allegations of the answer held to not show sufficient endeavors to deliver the message promptly.

Plaintiff held not bound by negligence of sender, not shown to be his agent.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Meredith*, vol. 1, p. 643; *W. U. Tel. Co. v. Jones*, vol. 1, p. 580; *W. U. Tel. Co. v. Fenton*, vol. 1, p. 198; *W. U. Tel. Co. v. Meek*, vol. 1, p. 138; *W. U. Tel. Co. v. Hopkins*, vol. 1, p. 135; *W. U. Tel. Co. v. Pendleton*, vol. 1, p. 632; *W. U. Tel. Co. v. Blanchard*, vol. 1, p. 404.

Western Union Telegraph Company v. McKibben.

APPEAL from Circuit Court, Brown county.

Action for special damages for negligence in delivery of telegram. Appeal by defendant below. Facts stated in opinion.

J. E. McDonald, J. M. Butler, A. L. Mason, A. H. Sum, and *A. J. Beveridge*, for appellant.

J. C. Orr, for appellee.

Howk, J.: This suit was commenced by appellee, McKibben, against the appellant, on the 11th day of April, 1885, in the Bartholomew Circuit Court. The object of the suit was to recover certain special damages which appellee averred that he had sustained by and through the alleged negligence of appellant, its operators and servants, in failing to deliver a certain telegraphic dispatch or message. After the cause was put at issue, on appellant's application the venue thereof was changed to the court below. There the issues joined were tried by a jury, and a general verdict was returned for appellee, assessing his damages in the sum of \$244.50. With their general verdict, the jury also returned into court their special findings on particular questions of fact submitted to them by appellant under the direction of the court. Over appellant's motions for judgment in its favor on the special finding of the jury, notwithstanding their general verdict, and for a new trial, the court rendered judgment for appellee for his damages assessed by the jury in their general verdict, and for his costs in this action expended.

In this court, errors are assigned by appellant which call in question the rulings of the trial court in sustaining appellee's demurrers to the second, third, and fourth paragraphs of its answer, and in overruling its motions to strike out parts of the deposition of William F. Thompson, and for a new trial, and also the sufficiency of the facts stated in appellee's complaint herein to constitute a cause of action.

In his complaint, appellee averred that appellant was a telegraph company, exercising the franchises of a corporation under the laws of this State, and had a line of telegraph wires extending from Terre Haute, in Vigo county, to Columbus, in Bartholomew county, in this State; that, on the 11th day of November, 1884, appellant was engaged in telegraphing for the public generally, and in receiving and transmitting over such wires of telegraphic messages for hire; that appellee was by occupation or trade a mechanical or steam engineer, and was wholly dependent upon his said trade and his labor thereat for the daily maintenance of himself and his family; that, on the day last named, and for a short time prior thereto, appellee was out of employment, and had applied to the Keyes Manufacturing Company, of Terre Haute, Indiana, then and there engaged in manufacturing, for employment as an engineer, but at the time of his application to such company no vacancy existed in the engineer's department of such factory, and he was not employed therein; that thereupon appellee requested of the agents of such manufacturing company that when a vacancy should occur in the engineer's department thereof he should be employed therein, and further requested such agents to notify him, when such company should want him, by a telegram to John M. Thompson, at Columbus, Indiana; that thereupon appellee made arrangements with said John M. Thompson that in case he should receive any telegram from Terre Haute in reference to appellee, or to his employment by such company, said Thompson would find appellee and communicate to him the contents of such telegram.

And appellee further alleged that on November 11, 1884, a vacancy occurred in the engineer's department of such company's establishment; that one William F. Thompson, an employee and as the agent of such company, having full authority therein to employ appellee as an engineer in such factory for and on behalf of such company, on the day last named sent from appellant's office in Terre Haute, Indiana, to said John M. Thompson, at Columbus, Indiana, for the

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use and benefit of appellee, a telegraphic message of the terms and tenor following, to-wit:

“TERRE HAUTE, Ind., November 11, 1884.

“*To John M. Thompson, Columbus, Ind.:* Tell McKibben to come at once. Two dollars per day. “[Signed], Wm. F. THOMPSON.”

And appellee averred that he was the same McKibben mentioned in such telegram, which was in reference to his employment as an engineer by the Keyes Manufacturing Company, at and for the wages of two dollars per day; that such message was duly sent from Terre Haute, over appellant's wires, and arrived at its office in Columbus, Indiana, at about 2 o'clock P. M. of November 11, 1884; that said John M. Thompson was then, and for six years preceding had been, a resident of such city of Columbus, and during all of such six years had resided in the same house and location in such city, and within one mile of appellant's office or station therein; and that said John M. Thompson was at home on that day, and was easily accessible to appellant's agents at Columbus for the purpose of the delivering of the aforesaid telegram.

But the appellee averred that, notwithstanding the facts aforesaid, appellant, and its agents and employees in charge of its office and business at Columbus, negligently failed and refused to deliver such telegram to said John M. Thompson on said day, or to make any proper inquiries and search for said John M. Thompson or his place of residence, and negligently permitted such telegram to lie in appellant's office at Columbus, and wholly failed, neglected and refused to deliver such telegram to said John M. Thompson, or to anyone else; that if appellant had promptly delivered such message to said John M. Thompson, as it might and ought to have done, he would have promptly communicated the contents thereof to appellee, who would have gone at once to Terre Haute and accepted the situation so offered by the Keyes Manufacturing Company at the wages mentioned in such telegram; that said company held such situation open for appellee for about 48 hours after

sending such message, and appellee having failed to arrive at Terre Haute to take such situation, said company had not since a vacancy in its establishment wherein appellee could be engaged; that appellee was a competent engineer, and would have given satisfaction to such company had he been employed thereby; that, by reason of appellant's negligence in failing to deliver such telegram as aforesaid, appellee was and had been deprived of employment in the situation aforesaid from November 11, 1884, until the commencement of this suit, and had been during such time out of employment of any kind, although during all of such time he had made diligent efforts to obtain employment in his trade or occupation, and to obtain work at anything; that, by reason of such negligence of appellant, appellee had lost the two dollars per day which he would have obtained in the employment offered him by such manufacturing company for 160 days, and had lost the opportunity for permanent employment, which would have been given him in such situation by the Keyes Manufacturing Company. By reason of all which, appellee had been and was damaged in the sum of \$500, which was due and unpaid. Wherefore, etc.

The first error complained of here, by appellant's learned counsel, is the sustaining of appellee's demurrer to the second paragraph of the answer.

In this paragraph of answer, appellant alleged that the telegraphic message mentioned in appellee's complaint was delivered to appellant's agent at its office in the city of Terre Haute, Indiana, on the 11th day of November, 1884; that such message, when delivered to appellant for transmission, was written upon one of its message blanks provided for that purpose; that the terms and conditions upon which appellant agreed and undertook to transmit such message were printed upon such message blank, and the sender of such message agreed to such terms and conditions subject to which such message was to be transmitted; that the terms and conditions upon which appellant undertook the transmission of such message were in

the words and figures following: Here are set out such "terms and conditions," all of which we omit except the following, namely: "The company will not be liable in any case for damages where the claim is not presented in writing within sixty days after sending the message."

And appellant averred that no claim for the damages alleged in appellee's complaint, nor for any damages growing out of the non-delivery, as averred, of the aforesaid telegram, was presented to appellant in writing within sixty days after sending such message, as provided for in such terms and conditions printed on such message blank, and agreed to by the sender. Wherefore, etc.

It is earnestly contended, on behalf of appellant, that the facts stated in the second paragraph of its answer, and admitted to be true by the demurrer thereto, are amply sufficient to bring appellee's case within the decisions of this court in *Western Union Tel. Co. v. Meredith*, 95 Ind. 93, and *Western Union Tel. Co. v. Jones*, 95 Ind. 228 (48 Am. R. 713), and to bar his right to recovery herein. In each of these cases it was held, substantially, that a telegraph company might reasonably limit its liability to the sender of a message by an express contract, and that a limitation of sixty days for the presentation of claims is a reasonable one.

Our statute, in force since May 6, 1853, provides as follows: "Telegraph companies shall be liable for special damages occasioned by failure or negligence of their operators or servants in receiving, copying, transmitting, or delivering dispatches," etc. Section 4177, R. S., 1881.

In considering this section of the statute, it was held by this court in *Western Union Tel. Co. v. Fenton*, 52 Ind. 1, that the section is clearly broad enough to authorize a person to whom a dispatch is sent to recover in a proper case, although the relation of contractors does not exist between him and the company. In the case cited it appeared that a dispatch was sent to the plaintiff, Fenton, under stipulations agreed to by the sender, one Evelyn, providing for repeating messages at half-rates, in addition,

and that the company should not be liable for mistakes or delays in the transmission or delivery of any unrepeatd message beyond the amount received for sending the same. It appeared, further, that the sender, Evelyn, did not order the repeating of the message, nor pay or offer to pay for repeating it, but paid merely the regular rates.

It was there held that the statutory provisions above quoted were "clearly broad enough to authorize a person to whom a dispatch is sent to recover, in a proper case, though the relation of contractors does not exist between him and the company." The court there said: "A telegraph company, exercising corporate franchises, whose business it is to transmit and deliver messages, owes certain duties to the public, and among those duties is that of delivering, without unreasonable delay, messages which are thus transmitted. For a violation of that duty the company, it would seem, ought to be responsible to the party injured."

With respect to the stipulation providing for repeating messages at half-rates in addition, and that the company should not be liable for delays in the delivery of any unrepeatd message beyond the amount it received for sending the same, it was further held by this court, in the same case (1) that the stipulation was unreasonable, as it was not apparent how the repetition of a message would conduce to its prompt delivery; (2) that the company could not contract against liability for its own negligence; and (3) that the action was based upon the statute, and not upon any contract between the parties.

The same doctrine, at least to the extent that the person to whom a dispatch was sent may maintain an action against the company, based upon the provisions of section 4177, *supra*, for the recovery of special damages, without regard to the stipulations in the contract between the sender of the message and the company, has been recognized and approved in several other decisions of this court. *Western Union Tel. Co. v. Meek*, 49 Ind. 53; *Western Union*

Tel. Co. v. Hopkins, 49 Ind. 223; *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12 (48 Am. R. 692).

In the case last cited the court said: "The English cases deny that the person to whom the message is sent can maintain an action for damages against the company, for the reason that there is no privity of contract. *Dickson v. Reuter's Tel. Co.*, L. R., 2 C. P. D. 62; *Playford v. U. K. Tel. Co.*, L. R., 4 Q. B. 706. The American cases, however, take a different view of the subject, for they hold that, if the error occurs in transmitting the message, the person to whom the message is sent may maintain an action for damages; but, while this is held, it is conceded that the holding constitutes an exception to the general rule." *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; (45 Am. R. 480, and note, page 486).

In the case in hand, appellee's action is founded upon the provisions of section 4177, above quoted, and the facts of the case are very similar to those in *Western Union Tel. Co. v. Fenton*, *supra*. We are of opinion, therefore, that appellee was not bound or affected by the stipulation in the contract between the company and the sender of the message, and that the demurrer to the second paragraph of appellant's answer was for this reason correctly sustained. In this connection, we may properly remark that section 4177, *supra*, in force since May 6, 1853, is not repealed, nor in any manner affected, by any of the provisions of the act of April 8, 1885, entitled "An act prescribing certain duties of telegraph and telephone companies, prohibiting discrimination between patrons, providing penalties therefor, and declaring an emergency." Acts of 1885, pp. 151 and 152.

Appellant next complains, in argument, of the sustaining of appellee's demurrer to the third paragraph of its answer. In this paragraph, appellant alleged that the message mentioned in appellee's complaint was delivered to its agent at its office in the city of Terre Haute at 2 o'clock P. M. of the eleventh day of November, 1884, and was transmitted from thence promptly and without delay, and in the order

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of time in which it was received, to the city of Columbus, Indiana, the place of its address ; that immediately on the receipt of such message appellant's agent at said city of Columbus copied and enclosed the same in one of its envelopes, and sent it out for delivery to the person to whom it was addressed, by appellant's messenger boy, employed for that purpose, promptly and without delay, and in its regular order ; that neither appellant's agent nor its messenger was acquainted with said John M. Thompson, to whom the message was addressed, nor with his place of residence, and that said messenger inquired at all the hotels, and at the post-office, and of persons on the streets, in such city of Columbus, as to the whereabouts and residence of said John M. Thompson, but could get no information either as to his whereabouts or place of residence ; that, failing to find said Thompson, said messenger returned to appellant's office in such city of Columbus with said message, and reported to such agent at said office that he could not find said Thompson ; that appellant's agent again sent said messenger out to deliver said message, with instructions to deliver it to McKibben, the party mentioned in the message, if he could be found ; that said messenger was unable to find either Thompson or McKibben, and returned to appellant's said office with said message, having made diligent search for said parties, and having failed to find either of them.

Appellant further averred that, having failed to deliver said message to said John M. Thompson, its agent at such city of Columbus, on the evening of November 11, 1884, sent an office message to such city of Terre Haute, notifying appellant's said agent that said Thompson could not be found, and that said message was undelivered ; that upon the following day, to wit, November 12, 1884, appellant's agent at such city of Terre Haute notified W. F. Thompson, the sender of said message, that said John M. Thompson could not be found at Columbus, and that the message had not been delivered ; that said W. F. Thompson gave no further or better instruc-

tions as to how said message could be delivered, and gave no other or better address of said John M. Thompson at such city of Columbus to appellant's said agent; that said W. F. Thompson knew that said message was not delivered to said John M. Thompson, and that said McKibben had not been notified, by means of said telegram, of the contents thereof; that, at the time of being notified by appellant's said agent of the non-delivery of said message, the said W. F. Thompson assented to appellant's action in not delivering said message, and said it was all right, and paid appellant its charges for sending said message. Wherefore, etc.

We are of opinion that the facts stated by appellant, in this third paragraph of its answer, were and are wholly insufficient to constitute a valid defense to appellee's action, unless it can be correctly said that W. F. Thompson, the sender of the message mentioned in the complaint, was, at the time, the agent merely of appellee, McKibben, and acted for him and by his procurement, and not as the agent and by the authority and direction of the Keyes Manufacturing Company, in sending such message. This, indeed, is the theory of appellant's learned counsel in discussing the alleged sufficiency of the third paragraph of the answer, namely: "That the sender of the message acted as the agent of the plaintiff, and under his directions, in sending the same; and that therefore, when the sender of the message refused to give a further or better address, that failure was the failure of the plaintiff himself; and the plaintiff, through the act of his agent, became a contributor to the negligence, if such there was, which caused the non-delivery of the telegram."

If appellant had averred, as it might easily have done if the facts would have warranted the averment, in the third paragraph of its answer, that W. F. Thompson, "the sender of the message, acted as the agent of the plaintiff, and under his directions, in sending the same," its counsel would have had some foundation for their contention that, when W. F. Thompson failed or refused to give a further

or better address for John M. Thompson than Columbus, Indiana, the failure or refusal was that of the plaintiff, and that he, through such failure or refusal of W. F. Thompson, became a contributor to the negligence which caused the non-delivery of the telegram to John M. Thompson. But the third paragraph of appellant's answer contained no such averment, and none from which it might be inferred, even, by any fair rule of construction, that W. F. Thompson acted as the agent of the plaintiff, and under his directions, in sending the message mentioned in his complaint. Indeed, this much is virtually conceded by appellant's counsel in argument. "But (counsel say) under the averments of the complaint, nothing is plainer than that the sender of the message, William F. Thompson, acted as the agent of the plaintiff in sending the message."

We do not so understand the averments of the complaint. It is shown thereby that plaintiff applied to the Keyes Manufacturing Company for employment as an engineer, and was promised such employment when a vacancy might occur in the engineering department of the factory, and he left with the agents of that company the address of John M. Thompson, at Columbus, Indiana, as the person through whom the company or its agents might communicate with him, when such vacancy should occur. It is nowhere averred in the complaint, in terms or in effect, that he had appointed W. F. Thompson his agent to send such telegram; but, on the contrary, it is expressly averred therein that William F. Thompson, "as the agent of such company, having full authority therein to employ plaintiff as an engineer in said factory, for and on behalf of said company," sent the aforesaid telegram. In the face of this allegation, it cannot be correctly said, we think, that under the averments of the complaint, "the sender of the message, William F. Thompson, acted as the agent of the plaintiff in sending the message."

The averments of the third paragraph of answer in relation to the search and inquiry for John M. Thompson by appellant's messenger-boy are no sufficient answer, as it

seems to us, to the uncontroverted fact, stated in the complaint, that said John M. Thompson had resided in the same house and location in the town or city of Columbus, during all of six years preceding the eleventh day of November, 1884. For the reasons given, we are of opinion that the court did not err in sustaining appellee's demurrer to the third paragraph of appellant's answer.

Appellant next complains of the sustaining of appellee's demurrer to the fourth paragraph of its answer. In this paragraph, appellant alleged substantially the same facts as were pleaded by it in both the second and third paragraphs of its answer and the additional fact "that the plaintiff himself, six days after the sending of the message, was notified of the fact that the message had been sent." What we have said, in considering separately the sufficiency of the second and third paragraphs of answer, disposes also of the error assigned upon the decision of the court in sustaining the demurrer to the fourth paragraph of answer. The consolidation of the facts stated in the second and third paragraphs, in the fourth paragraph of answer, does not make the latter paragraph a good defence to appellee's action, nor does the averment of the additional fact, above stated, make the answer good. For reasons already stated, the court committed no error, we think, in sustaining the demurrer to the fourth paragraph of answer.

Under the alleged error of the court in overruling appellant's motion for a new trial, the only question presented, not already considered and decided, is the one of excessive damages. On this question, the trial court instructed the jury as follows:

"The measure of plaintiff's damages, in the event you find for plaintiff, will be two dollars per day for the time which elapsed from the date of the sending of the message, to wit, November 11, 1884, up to the date of the commencement of this action, excluding Sundays, and deducting therefrom any amount of money plaintiff has earned at other employment between the eleventh day of November, 1884, and the date of the commencement of this action. It

was the duty of plaintiff to make reasonable effort to secure other employment, after failing to secure the position mentioned in the telegram; and you should deduct from any amount found due plaintiff, according to the above standard, such amount as you find that, by reasonable diligence, he might have earned."

"It is manifest, we think, from the general verdict of the jury, and their special findings of facts, that they assessed plaintiff's damages substantially in accordance with the rules stated in the foregoing instruction. Did the trial court err in giving such instruction? It may perhaps be subject to criticism, in that the rule laid down therein for the measure of plaintiff's damages would seem to be much better adapted to an action for the breach of an executory contract than to an action such as the one at bar, to recover damages for the wrongful negligence of the defendant. But, while this is so, the instruction was more favorable to the appellant, we think, than it was entitled to upon the facts of this case, as shown by the evidence. It seems clear to us that the instruction quoted could not and did not harm the appellant; and, therefore, even if it were erroneous, it would not authorize the reversal of the judgment. The damages were not excessive. The evidence fully sustains the allegations of the complaint, the general verdict of the jury, and their special findings of fact.

The motion for a new trial was correctly overruled.

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

NOTE.—NIBLACK, J., wrote a dissenting opinion.

A petition for rehearing was overruled May 16, 1888.

This case is cited in the following cases in this volume: *Healy v. W. U. Tel. Co.*; *W. U. Tel. Co. v. Longwill*.

This and the four preceding cases, as well as those to be found in vol. 1, INDEX, title, "Indiana statute," are based on the statute which was repealed in 1885. The four succeeding cases arose under the act of 1885.

WESTERN UNION TELEGRAPH COMPANY V. STEELE.

Indiana Supreme Court, November 5, 1886.

(108 Ind. 163.)

INDIANA PENAL STATUTE OF 1885.

Acts 1885, page 151, repeals section 4176, Rev. St. 1881. Under the later act the penalty is confined to cases of bad faith, partiality or discrimination of the telegraph company.

Cases of this series cited in opinion: *W U. Tel. Co. v. Brown*, ante, p. 508.

ACTION for penalty for delay of telegram for more than forty hours. Appeal by defendant below.

J. E. McDonald, J. M. Butler and A. L. Mason, for appellant.

G. W. Paul, J. E. Humphries, W. E. Humphries, W. M. Reeves and J. M. Zuck, for appellee.

ELLIOTT, J.: The appellee instituted this action to recover the penalty imposed for a breach of duty by the statute.

The telegram was delivered to the appellant on the 23rd day of May, 1885, and the statute which governs is that enacted in 1885, for that act repeals the earlier one. *W. U. Tel. Co. v. Brown*, 108 Ind. 538.

The complaint must, therefore, be good, under the provisions of the later act.

It is settled law that a penal statute must be strictly construed, and we are, therefore, required to confine the operation of the statute to the cases which it specifies, for we can not extend it by construction. Acting upon this rule, we must hold that the act of 1885 does not prescribe a penalty for neglect in transmitting messages. This conclusion

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is, indeed, the only one that can be reached, without greatly enlarging the words of the statute; and it is strengthened by the fact that the statute which the act of 1885 repeals prescribed a penalty for a negligent breach of duty, while that of 1885 contains no such provision, thus clearly evincing the intention of the Legislature not to give a penalty for a negligent breach of duty.

The act of 1885 prescribes a penalty for a breach of duty only in three cases, bad faith, partiality, discrimination, and the complaint before us shows, at most, a mere neglect of duty, and fails entirely to show bad faith, partiality, or discrimination.

Judgment reversed.

NOTE.—This case is cited in the following cases in this volume: *W. U. Tel. Co. v. Jones*; *Hadley v. W. U. Tel. Co.*; *W. U. Tel. Co. v. Swain*; *Frauenthal v. W. U. Tel. Co.*

See note to *Hadley v. W. U. Tel. Co.*, *post*.

THE WESTERN UNION TELEGRAPH COMPANY V. ALBERTUS
SWAIN.

Indiana Supreme Court, Jan. 28, 1887.

(109 Ind. 405.)

INDIANA STATUTE OF 1885.

The statute, acts Indiana 1885, p. 151, imposes a penalty, not as in the earlier act, for mere neglect or postponement of transmission, but only for partiality and discrimination.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Steele*, *ante*, p. 538; *W. U. Tel. Co. v. Wilson*, *ante*, p. 519.

ACTION for statutory penalty. Appeal by defendant below from a judgment of the Circuit Court, Wayne County. The facts are sufficiently stated in the opinion.

J. E. McDonald, J. M. Butler & A. L. Mason, for appellant.

A. C. Lindemuth, for appellee.

MITCHELL, J.: An act approved April 8, 1885, "prescribing certain duties of telegraph and telephone companies, prohibiting discrimination between patrons," etc., provides that every telegraph company, with a line of wires wholly or partly within this State, shall, during the usual office hours, receive and transmit dispatches with impartiality, and in good faith, and in the order of time in which they are received, and shall in no manner discriminate between any of its patrons, etc. A violation of any of the provisions of the act renders the person or company liable to any party aggrieved in a penalty of \$100.

On the fifth day of December, 1885, the appellee, Albertus Swain, commenced an action in the Wayne Circuit Court against the appellant, for the recovery of the prescribed penalty. A recovery was had according to the prayer of the complaint.

It is assigned for error here that the complaint does not state facts sufficient to constitute a cause of action.

After the proper formal allegations, the complaint charges that on the nineteenth day of October, 1885, the appellee delivered to the appellant's agent, at Richmond, Indiana, a certain telegraphic dispatch, addressed to William A. Hallett, at Neosho, Missouri, accompanying the message with the charges demanded for its transmission, but that the "defendant wholly failed and neglected to transmit said telegraphic message to said Hallett."

It thus appears that the default charged against the company was its negligent failure to transmit the message delivered to it to the person to whom the dispatch was addressed. For such a default simply, the statute above referred to imposes no penalty. The statutory duty, as respects telegraph companies, is to transmit messages with impartiality, and in good faith, and in the order of time in

which they are received, without discrimination. The statutory penalty is incurred when its acts or omissions are characterized by, or result from, partiality or bad faith, or when it postpones messages out of the order of time in which they are received, or when it discriminates in rates charged, or in the manner and conditions of service between its patrons. Each and all of the acts which involve the company in penal consequences, proceed from some aggressive violation of statutory duty imposed, and not from a mere negligent omission to act according to the obligation of its contract, as a public carrier of messages.

Section 4176, which is superseded by the act of April 8, 1885, imposed a penalty, "in case of failure to transmit, or if postponed out of such order, * * * to be recovered by the person whose dispatch is neglected or postponed."

A broad difference is at once apparent between the statute now in force and that which preceded it, on the same subject. Being highly penal in character, it is to receive such a construction as not to involve penal consequences, except when the act complained of is clearly within the prohibition of the statute. *W. U. Tel. Co. v. Steele*, 108 Ind. 163; *W. U. Tel. Co. v. Wilson*, 108 Ind. 308.

Since the complaint charges a merely negligent omission of duty, without more, it fails to bring the case within the consequences of the statute. The first assignment of error is well made.

The judgment is reversed, with costs.

NOTE.—This case is cited in the following cases in this volume: *W. U. Tel. Co. v. Jones*; *Hadley v. W. U. Tel. Co.*; *Frauenthal v. W. U. Tel. Co.*
See note to next case.

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HENRY HADLEY v. WESTERN UNION TELEGRAPH COMPANY.

Indiana Supreme Court, Feb. 28, 1888.

(115 Ind. 191.)

DELAY OF TELEGRAM.—INDIANA STATUTE OF 1885.—RIGHTS OF ADDRESSEE.

The Indiana act of 1852 (section 4176, R. S. 1881), was repealed by acts 1885, p. 151; and telegraph companies are under the later act not liable to a penalty for mere negligence either in transmission or failure to transmit.

Section 4177, giving special damages for failure or negligence, is undisturbed.

The penalty can be recovered only by the sender of the dispatch; but the action for damages may be maintained by any one sustaining injury.

Held, that in the given case, the language of the telegram sufficiently indicated the necessity of prompt delivery to warrant a verdict for damages.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Steele*, ante, p. 538; *W. U. Tel. Co. v. Brown*, vol. 1, p. 461; *W. U. Tel. Co. v. Swain*, ante, p. 539; *W. U. Tel. Co. v. Meek*, vol. 1, p. 138; *W. U. Tel. Co. v. Fenton*, vol. 1, p. 198; *W. U. Tel. Co. v. Ferguson*, vol. 1, p. 266; *W. U. Tel. Co. v. Lewelling*, vol. 1, p. 263; *W. U. Tel. Co. v. Lindley*, vol. 1, p. 275; *W. U. Tel. Co. v. Trissal*, vol. 1, p. 682; *W. U. Tel. Co. v. McDaniel*, vol. 1, p. 793; *W. U. Tel. Co. v. Axtell*, vol. 1, p. 295; *W. U. Tel. Co. v. Mossler*, vol. 1, p. 645; *W. U. Tel. Co. v. Roberts*, vol. 1, p. 439; *W. U. Tel. Co. v. Pendleton*, vol. 1, p. 632; *W. U. Tel. Co. v. McKibben*, ante, p. 525; *First Nat. Bank of Barnesville v. W. U. Tel. Co.*, vol. 1, p. 221; *Mackay v. W. U. Tel. Co.*, vol. 1, p. 362; *Beaupre v. P. U. & A. Tel. Co.*, vol. 1, p. 141; *Candee v. W. U. Tel. Co.*, vol. 1, p. 99.

APPEAL from Circuit Court, Hendricks county.

The facts appear in the opinion.

E. C. Hogate, R. B. Blake and G. C. Harvey, for appellant.

J. E. McDonald, J. M. Butler, A. L. Mason, A. H. Snow and A. J. Beveridge, for appellee.

NIBLACK, J.: Henry Hadley brought this action against the Western Union Telegraph Company to recover the statutory penalty, and additional and special damages, for the alleged failure of the company to transmit, as well as to deliver, a telegraphic message within proper time. The complaint was in two paragraphs.

The first demanded the prescribed penalty of \$100 for a failure to transmit the message with the requisite promptitude, and the second demanded special damages in the sum of \$500 for a failure to deliver the message within time to serve the purposes for which it was intended, alleging the particular facts relied upon to sustain such a demand.

A jury was empaneled to try the cause, and, being instructed so to do, they returned a special verdict, stating the facts as they found them from the evidence.

Hadley thereupon moved for judgment on the first paragraph of the complaint for the sum of \$100, and on the second paragraph for the sum of \$16.80, the amount of damages conditionally assessed by the jury, but the court overruled his motion, and, instead, rendered judgment in favor of the telegraph company.

Questions were reserved below, and are again made here, upon the sufficiency of both paragraphs of the complaint, and that of certain paragraphs of the answer, but the real merits of the controversy are better presented by the special verdict. We, therefore, consider it unnecessary to make any formal rulings upon the pleadings.

The special verdict was as follows: "We, the jury, do make and return the following special verdict in this case: On the 14th day of October, 1886, and for a long time prior to that date, and continuously from that time to the present, the defendant, the Western Union Telegraph Company, was, and has been, an electric telegraph company, duly organized as a corporation, and engaged in transmitting telegraphic messages for the public for hire. During all that time the defendant was the owner and operator of a line of telegraph wires extending to and through each of the towns of North Salem and Danville, in Hendricks

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county, in the State of Indiana, in each of which said towns said defendant had a public office for the accommodation of the public in transmitting telegraphic messages. On said 14th day of October, 1886, one Samuel C. Clay placed in the hands of the defendant's agent at said North Salem office, during the usual office hours thereof, a message notifying the plaintiff that said Clay would take and receive certain cattle which he had before that time purchased of the plaintiff, and for the plaintiff to meet him at the pasture early next morning for that purpose, which message was in the words and figures following, to wit:

“ NORTH SALEM, Indiana, October, 14, 1886.

“ *To Henry Hadley, Danville, Indiana*: Want your cattle in the morning. Meet me at pasture.

‘S. C. CLAY.’”

“That said message the defendant then and there undertook and agreed to transmit to said Henry Hadley at Danville, Indiana, the said Clay having then and there paid in advance the usual fee, to wit, the sum of twenty-five cents, for the transmission of said message, the full amount demanded of him by said agent on that account. Said agent did not transmit, and the agents of the defendant at Danville, Indiana, did not receive, said message for the space of one and one-half hours after it was left by said Clay at said defendant's North Salem office for transmission. Said message was received by the defendant's agent at its said Danville office during the defendant's usual office hours at that place, and although the plaintiff resided within less than one mile of said office, the defendant's agents at said office, in bad faith, refused to deliver said message to the plaintiff for the space of ten hours, although they were, during all that time, present at said office for the purpose of performing such duties. In thus failing and refusing to deliver said message to the plaintiff after it was received at said Danville office, the defendant and the agents were guilty of partiality, bad faith, and discrimination against the plaintiff, in this, to wit, that, at the time

of sending said message as aforesaid, as well as long before and long after that time, it was the custom and practice at said Danville office of the defendant and its agents to deliver to its patrons at that point, and to the public generally, like messages to that above mentioned, during all the like hours and times that said message lay in said Danville office undelivered to said Hadley as aforesaid.

“At the defendant’s Dansville office, at the time the message in question was sent, and both before and after that time, it was the practice of Horace Goodwin, during all the hours of the night, to receive and transmit messages over the lines of the defendant to its distant offices, and to receive messages over its lines at said Danville office from its offices at distant points, and to receive and collect the tolls and fees for the transmission of such messages, and account to the defendant or its agents.

On said 14th day of October, 1886, the plaintiff was the owner of a farm near the town of North Salem, on which he was then and there feeding and grazing a large drove of cattle which he had before that time sold to the said Samuel C. Clay, to be delivered between the 14th and 31st days of October, 1886, at the option of Clay. Said message was designed by said Clay to notify said Hadley, that he, said Clay, would weigh and take said cattle on the morning of the 15th of said month, and the defendant, by its agreement to transmit said message as aforesaid, undertook to notify said Hadley of the option of said Clay to take them at that time. Owing to the wrongful and negligent failure of the defendant to deliver said message promptly and without delay, as above set forth, the plaintiff received no information whatever of said Clay’s election to take said cattle as aforesaid until seven o’clock A. M. of said 15th day of October, 1886. At that date, as well as long before and after that time, it was the invariable rule and custom among cattle buyers and sellers throughout said county, and in the neighborhood and vicinity of both said offices of the defendant, to take and weigh cattle, sold as above mentioned, at an early daylight in the morning of the day

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named for the delivery. In pursuance of said rule and custom, and the terms of his contract, the said Clay, by his agent, at daylight on the morning of the 15th day of October, 1886, went to the pasture of the said Hadley, and took and weighed and drove away said cattle, the said Hadley not being present, either in person or by agent. If said Hadley had received said message before the weighing of said cattle, or if he had received any information from any other source that they were to be so weighed, he would have been present in person to superintend said weighing and delivery. In the process of weighing and taking of said cattle by said Clay, as aforesaid, and without any fault or negligence on the part of said Clay, said cattle were delayed and retained in the public highway for the space of thirty or forty minutes before they were weighed, on account of the absence of the plaintiff for whom the agent of said Clay was waiting; by which delay and detention, as aforesaid, said cattle were decreased in weight to the amount of four hundred and twenty pounds, and in value to the amount \$16.80. If the court, upon the facts set forth in the special verdict, should be of the opinion that the law is with the plaintiff, then we find for the plaintiff, and assess his damages at the sum of \$16.80, but if the court should consider that the law is with the defendant, then we find for the defendant."

The act of 1852, section 4176, R. S. 1881, provided that telegraph companies, engaged in telegraphing for the public, should, during the usual office hours, receive dispatches, and, on payment or tender of the usual charge, "transmit the same with impartiality and good faith, and in the order of time in which they are (were) received, under penalty, in case of failure to transmit, or if postponed out of such order, of \$100 to be recovered by the person whose dispatch is (was) neglected or postponed."

The act of 1885, covering the same subject-matter, is as follows :

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“Section 1. That every telegraph company with a line of wires wholly or partly within this State, and engaged in doing a general telegraphic business, shall, during the usual office hours, receive dispatches, whether from other telegraph lines, or other companies or individuals, and shall, upon the usual terms, transmit the same with impartiality, and in good faith, and in the order of time in which they are received, and shall in no manner discriminate in rates charged, on words or figures charged for, or manner or conditions of service between any of its patrons, but shall serve individuals, corporations, and other telegraphic companies with impartiality; Provided, however, That arrangements may be made with the publishers of newspapers for transmission of intelligence of general public interest out of its order, and that communications for and from officers of justice shall have precedence of all others.”

The second section contains kindred provisions concerning telephone companies.

The third section declares that

“Any person or company violating any of the provisions of this act shall be liable to any party aggrieved in a penalty of one hundred dollars for each offense, to be recovered in a civil action in any court of competent jurisdiction.” Acts of 1885, p. 151.

It was held in the cases of *Western Union Tel. Co. v. Steele*, 108 Ind. 163, and *Western Union Tel. Co. v. Brown*, 108 Ind. 538, that this act of 1885 repealed section 4176, R. S. 1881, first above referred to, and that telegraph companies are no longer liable to a fixed penalty of \$100 for a merely negligent breach of duty, either in the transmission of, or in the failure to transmit telegraphic messages. This construction of the act of 1885 was reaffirmed in the more recent case of *Western Union Tel. Co. v. Swain*, 109 Ind. 405, and is one to which we feel constrained to adhere. Telegraph companies are, nevertheless, liable under section 4177, R. S. 1881, which remains in force, as well as upon the general principles of the common law, for special damages for failure or negligence in receiving, copying, transmitting, or delivering dispatches. *Western Union Tel. Co. v. Ward*, 23 Ind. 377 (85 Am. Dec. 462); *Western Union Tel. Co. v. Meek*, 49 Ind. 53; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Western Union*

Tel. Co. Ferguson, 57 Ind. 495 ; *Western Union Tel. Co. v. Lewelling*, 58 Ind. 367 ; *Western Union Tel. Co. v. Lindley*, 62 Ind. 371 ; *Western Union Tel. Co. v. Trissal*, 98 Ind. 566 ; *Western Union Tel. Co. v. McDaniel*, 103 Ind. 294.

So far as we are at present advised, this court has uniformly ruled that it was only the sender of a telegraphic dispatch who could recover the fixed penalty prescribed by section 4176, *supra*, for a violation of its provisions, and in argument the correctness of these rulings is conceded. See *Western Union Tel. Co. v. Brown*, *supra*.

But it is now sought to be maintained that, under the act of 1885, the right to sue for and recover the fixed penalty is not restricted to the sender of the dispatch, but that the phrase "any party aggrieved" is broad enough to include as well the person to whom, or corporation to which, the dispatch is directed, when aggrieved by a non-compliance with the requirements of that act.

In the construction of a statute authorizing the recovery of a penalty, a strict, rather than liberal, interpretation ought to be given to its provisions, and in such a case, as in others where the meaning is seemingly obscure, a resort may be had to previous legislation on the same subject. *Western Union Tel. Co. v. Axtell*, 69 Ind. 199 ; *Western Union Tel. Co. v. Roberts*, 87 Ind. 377 ; *Western Union Tel. Co. v. Mossler*, 95 Ind. 29.

It is true that the fixed penalty is imposed for the breach of a duty which telegraph companies owe to the public generally, and not as damages for the non-performance of a contract to properly transmit a dispatch. But such a breach of duty can not arise until after a telegraph company has either entered into a contract, or has become obligated to transmit the dispatch.

The generally accepted doctrine, both in this country and in England, has so far been that it is only the sender of a dispatch who occupies that privity of contract or relation with the telegraph company which is necessary to the maintenance of a suit for the statutory penalty. It is to

him, and only to him, as the holding has so far generally been, that the company directly assumes the obligation of sending the dispatch in the manner required, and under the restrictions imposed by law. This is well illustrated by the case of *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12, and the authorities there cited.

That case has been disapproved by the Supreme Court of the United States, in so far as it treats of certain interstate relations in telegraphy; but in all other respects it remains unimpaired.

We do not feel at liberty to hold that this long and well accepted rule of decision has been changed by the act of 1885. It is but reasonable to suppose that if the Legislature had intended to change a rule so well defined, and so generally recognized by the courts, it would have done so in terms more direct and more explicit.

The primary object of the first section of the act in question evidently was to protect the interests of the patrons of telegraph companies by preventing, so far as is reasonable, any discrimination between them. It is only those who give business to, and send dispatches over the wires of, a telegraph company, that can rightly be called its patrons, within the meaning of the statute. In this view, it is only those entitled to be considered as the patrons of such a company who are authorized to enforce the statutory penalty when it has been incurred.

The person to whom a dispatch is sent can not, therefore, become a "party aggrieved," in the sense contemplated by the act under consideration. Any other construction might result in a multiplicity of suits to recover the same penalty.

The right of Hadley to have judgment for the sum of \$16.80, conditionally assessed in his favor by the jury, involves the application of principles not so well defined, and hence the decision of a question not capable, in our view, of so easy a solution.

The English cases deny the right of the person to whom the dispatch is sent to recover damages for default, either in its transmission or its delivery, upon the ground that

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there is no privity of contract between him and the company. Many of the American cases, however, give a more liberal construction in favor of the person to whom the dispatch is sent, and this more liberal construction has been adopted as the better and more reasonable rule by this court. *Western Union Telegraph Co. v. Fenton, supra*, is the leading case upon that subject. See, also, the case of *Western Union Telegraph Co. v. Pendleton, supra*, and the later case of *Western Union Tel. Co. v. McKibben*, 114 Ind. 511.

The rule thus adopted by the court is not expressly based upon that theory, but it receives much support from the equitable doctrine that one person may contract with another in such a way as to inure to the benefit, in whole or part, of a third person, who may, at his option, enforce [so much of the contract as was intended to be for his benefit, or demand compensation for its non-performance.

The circumstances under which a person to whom a dispatch is sent may recover damages for a mistake or default in the transmission of the dispatch, or for an unreasonable delay in its delivery, or for its non-delivery, are various, and are incapable of an exact hypothetical definition applicable alike to all cases that might occur. It may be said, generally, that the company is only liable for such damages as naturally flow from the breach of duty complained of, or such as may fairly be supposed to have been within the contemplation of the parties as a possible result at the time the dispatch was sent; also that the damages must result from the default of the company as a proximate cause. In determining what was fairly within the contemplation of the parties when the dispatch was sent, the terms or contents of the dispatch may be taken into consideration. *Bank v. Western Union Tel. Co.*, 30 Ohio St. 555; *Mackay v. Western Union Tel. Co.*, 16 Nev. 222; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 232; *Beaupre v. P. & A. Tel. Co.*, 21 Minn. 155; *Hadley v. Baxendale*, 9 Exch. Rep. 341; *Candee v. Western Union Tel. Co.*, 34 Wis. 471.

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In this case, the terms or contents of the dispatch sent by Clay to Hadley fairly indicated the necessity of its prompt delivery, as well as transmission, and were such as to authorize the inference that a delay until the day following would result in confusion, and possible, if not probable, injury to one or both parties to the dispatch. While all the circumstances which led to the injury of the cattle were not found as fully, perhaps, as they might have been, and while the question involved is a fairly debatable one, and not free from difficulty, we are inclined to the opinion that the Circuit Court erred in refusing to render judgment in favor of Hadley for the amount of damages conditionally assessed by the jury, and have accordingly reached that conclusion.

The judgment is reversed, with costs, and the cause is remanded, with instructions to the Circuit Court to render judgment in favor of Hadley for the sum of \$16.80, in damages upon the second paragraph of his complaint.

Petition for a rehearing overruled June 28, 1888.

NOTE.—This and the two preceding cases arose under the statute of 1885, which is set forth in full, so far as telegraph companies are concerned, in the above opinion.

The former act, which this repeals, may be found at vol. 1, p. 183. To that statute all the cases in that volume, contained in the INDEX under title "Indiana Statute," relate.

It was stated in a note at page 13, vol. 1, that "the principal features of the old act are retained in the new." This remark was made upon a somewhat cursory examination of the two statutes, and without having in mind the foregoing cases, in which the later statute has been construed.

Upon a more careful examination, I am inclined to believe that a failure to note, in the statute itself, the distinction which the courts have found, may not have been wholly inexcusable.

This case is cited in *Elsey v. Postal Tel. Co.*, *post*.

See INDEX to this and to previous volume, title "Receiver or Addressee." See note, vol. 1, p. 39; note to *W.U. Tel. Co. v. Longwill*, *post*.

Telegraph Co. v. Jones.

WESTERN UNION TELEGRAPH COMPANY v. GEORGE B. JONES.

Indiana Supreme Court, Nov. 15, 1888.

(116 Ind. 361.)

INDIANA STATUTE OF 1885.

The penalty imposed on telegraph companies in Indiana by acts 1885, p. 151, for violation of the provisions of that act, applies only to cases of partiality, discrimination and bad faith, and not to cases of mere negligence. Cases of this series cited in opinion: *W. U. Tel. Co. v. Swain, ante, p. 538*; *W. U. Tel. Co. v. Steele, ante, p. 538*.

ACTION for penalty for negligent failure to transmit a message.

Appeal by defendant below, from judgment of Circuit Court, Bartholomew county.

J. E. McDonald, J. M. Butler and A. L. Mason, for appellant.

G. W. Cooper and C. B. Cooper for appellee.

ELLIOTT, J.: The facts stated by the court, and the conclusions of law drawn by it, very clearly show that the appellant was held liable for the statutory penalty, because it negligently failed to deliver a telegram sent by the appellee to Samuel Jones. There is no finding of bad faith or partiality, and none can be presumed.

It is quite clear that, in an action to recover a penalty imposed by law, it cannot be presumed, in aid of a special finding, that the defendant violated the law; on the contrary, the presumption is that the law was obeyed, and the statutory duty performed. The case must, therefore, be

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regarded as one of negligence only; and the question is whether, under the act of 1885, a telegraph company can be made to pay the penalty prescribed by that act, where the only wrong proved is a negligent one. This question is settled against the appellee by the decisions of this court. *W. U. Tel. Co. v. Swain*, 109 Ind. 405; *W. U. Tel. Co. v. Steele*, 108 Ind. 163.

It is to be remembered that the right to a penalty is purely a statutory one, and a penalty is only recoverable in the cases prescribed by the statute. It is also to be remembered that a penal statute can not be extended by construction. It follows, therefore, that unless a statute clearly gives the right to a penalty, none exists. As the act of 1885 does not prescribe a penalty for a negligent breach of duty, no penalty can be recovered. We are not, it may not be improper to remark, dealing with a claim for damages, but with a claim to a statutory penalty.

Judgment reversed.

NOTE.— See note to preceding case.

THE WESTERN UNION TELEGRAPH COMPANY V. GEORGE
A. YOPST.

Indiana Supreme Court, Feb. 12, 1889.

(118 Ind. 248.)

FAILURE TO TRANSMIT SUNDAY DISPATCH.— PREPAYMENT.— LIMITING TIME
TO PRESENT CLAIM.— WRITTEN NOTICE OF DEFAULT.— INDIANA PENAL
STATUTE.

To recover the statutory penalty for failure to send a dispatch which was presented for transmission on Sunday, the plaintiff must establish a necessity for sending it on that day and that the necessity was known to the company.

Messages designed to relieve suffering, avert harm and prevent serious loss, may be received and transmitted on Sunday.

Telegraph Co. v. Jones.

WESTERN UNION TELEGRAPH COMPANY v. GEORGE B.
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ACTION for penalty for negligent failure to transmit a message.

Appeal by defendant below, from judgment of Circuit Court, Bartholomew county.

J. E. McDonald, J. M. Butler and A. L. Mason, for appellant.

G. W. Cooper and C. B. Cooper for appellee.

ELLIOTT, J.: The facts stated by the court, and the conclusions of law drawn by it, very clearly show that the appellant was held liable for the statutory penalty, because it negligently failed to deliver a telegram sent by the appellee to Samuel Jones. There is no finding of bad faith or partiality, and none can be presumed.

It is quite clear that, in an action to recover a penalty imposed by law, it cannot be presumed, in aid of a special finding, that the defendant violated the law; on the contrary, the presumption is that the law was obeyed, and the statutory duty performed. The case must, therefore, be

Telegraph Co. v. Yopst.

regarded as one of negligence only; and the question is whether, under the act of 1885, a telegraph company can be made to pay the penalty prescribed by that act, where the only wrong proved is a negligent one. This question is settled against the appellee by the decisions of this court. *W. U. Tel. Co. v. Swain*, 109 Ind. 405; *W. U. Tel. Co. v. Steele*, 108 Ind. 163.

It is to be remembered that the right to a penalty is purely a statutory one, and a penalty is only recoverable in the cases prescribed by the statute. It is also to be remembered that a penal statute can not be extended by construction. It follows, therefore, that unless a statute clearly gives the right to a penalty, none exists. As the act of 1885 does not prescribe a penalty for a negligent breach of duty, no penalty can be recovered. We are not, it may not be improper to remark, dealing with a claim for damages, but with a claim to a statutory penalty.

Judgment reversed.

NOTE.— See note to preceding case.

THE WESTERN UNION TELEGRAPH COMPANY V. GEORGE
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Messages designed to relieve suffering, avert harm and prevent serious loss, may be received and transmitted on Sunday.

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Where the agent of a telegraph company declines to receive the price of transmission, but requests the sender to send it "collect," the fact of non-prepayment will not avail the company as an excuse for failure or delay.

Failure to give a written notice of default will defeat an action for penalty based on the default.

A stipulation requiring a written notice within sixty days after the time of "sending the message" does not apply if the message were not sent at all.

Cases of this series cited in opinion: *Rogers v. W. U. Tel. Co.*, vol. 1, p. 386; *Carnahan v. W. U. Tel. Co.*, vol. 1, p. 523; *W. U. Tel. Co. v. Wilson*, ante, p. 519; *Heimann v. W. U. Tel. Co.*, vol. 1, p. 531; *Cole v. W. U. Tel. Co.*, vol. 1, p. 707; *W. U. Tel. Co. v. Jones*, vol. 1, p. 580; *W. U. Tel. Co. v. Meredith*, vol. 1, p. 643; *Hockett v. State*, ante, p. 1; *W. U. Tel. Co. v. Lindley*, vol. 1, p. 275.

APPEAL by defendant below from judgment of Circuit Court, Cass county, awarding statutory penalty for failure to transmit a telegram. Facts stated in opinion.

J. R. Coffroth, T. A. Stuart, D. D. Dykeman, W. T. Wilson and *G. C. Tabor*, for appellant.

T. J. Tuley and *D. C. Justice*, for appellee.

ELLIOTT, C. J.: The complaint of the appellee is based upon the statute defining the duties of telegraph companies, and prescribing a penalty for a breach of duty. This penalty the appellee seeks to recover.

The principal objection urged against the complaint is that the telegram was received on Sunday, and that, as it does not appear that there was any necessity for receiving or transmitting it on that day, the contract which underlies the duty is invalid, and hence no recovery can be adjudged. It is true, as counsel assert, that a contract is essential to create a duty. *Rogers v. Western U. Tel. Co.*, 78 Ind. 169; *Carnahan v. Western U. Tel. Co.*, 89 Ind. 526; *Western U. Tel. Co. v. Wilson*, 108 Ind. 308. The complaint must be held insufficient unless there are facts pleaded establishing a valid contract. Ordinarily a contract made on Sunday is invalid. *Rogers v. Western U.*

Tel. Co., supra, and cases cited; *Western U. Tel. Co. v. Wilson, supra*. If, however, there is a necessity shown for receiving or transmitting a message on Sunday, then the contract is valid, and will constitute a sufficient foundation for the duty enjoined upon telegraph companies.

A contract to transmit a message regarding ordinary business, which can be transacted as well on any other day as on Sunday, is not within the exception to the general rule that ordinary business shall not be transacted on Sunday; but there may be facts which will impress it with the character of a work of necessity and take the transaction out of the general rule. An emergency requiring immediate action to prevent serious loss or injury may occur in a person's usual vocation which would make the work of delivering and transmitting a telegraphic message one of necessity. This is the principle asserted in our cases which hold that work or business within the scope of a person's usual vocation, may be performed or transacted on Sunday when necessary to preserve property, or prevent serious loss. *Yonoski v. State*, 79 Ind. 393; *Turner v. State*, 67 Ind. 595; *Edgerton v. State*, 67 Ind. 588; *Wilkinson v. State*, 59 Ind. 416; *Crocket v. State*, 33 Ind. 416; *Morris v. State*, 31 Ind. 189. The necessity which will excuse one who performs work or does business on Sunday is not required to be absolute or imperious, but it must, nevertheless, be a reasonable one. It is not possible to give a definition to the word "necessity" that will fit every case, for what will be just under the facts of one case may be unjust under the facts of another. The statute is intended to secure a quiet Sabbath, and make it a day of rest, on which men shall not be compelled to perform ordinary labor, or permitted to conduct ordinary business; but it is not its purpose to prohibit the performance of work where there is a necessity for its performance in the particular instance not existing in the usual course of the business of the person who does the act. It punishes persons who work or do business in the ordinary course, but it does not mean to punish a person who does an act on Sunday because the act is necessary to prevent serious loss or

injury. Telegraph companies, we judicially know, are permitted to keep open their offices for the transmission of messages on Sunday, because there are emergencies, involving sometimes life and sometimes great public and private interests, requiring that messages be transmitted on that day. In many instances it is, as every one knows, of the highest importance and most serious moment that messages should be received and transmitted on Sunday. In determining whether an act is or is not one of necessity it is proper to give just effect to the nature of the business in which the person who does it is engaged. We must do so here. We know that in many instances the transmission of a message on Sunday may be necessary to prevent great loss, and even to save life; and, knowing this, we can not do otherwise than hold that the business of telegraphing can not be brought under the same rules as that of a merchant, farmer, or mechanic. The merchant who keeps open his shop for business and custom on Sunday the same as on a secular day, by that act violates the law, although he would not necessarily violate it if, upon request, he should sell some article needed at once to prevent serious loss or suffering. The case of a telegraph company is different. It may keep open its offices for the receipt and transmission of messages where there is a reasonable necessity for transmitting them on that day, although it has no right on that day to do a general business. Messages that may as well be sent on any other day as on Sunday without causing loss, harm, or suffering, it is prohibited from receiving on that day; but messages designed to relieve suffering, avert harm, and prevent serious loss, it may on that day receive and transmit. The view we have taken is not only supported by our decisions and by those of many other courts, but it is no more than a development of a principle declared by a court which has gone as far as any in the land in enforcing the statutes against Sabbath-breaking. In *Flagg v. Inhabitants, etc.*, 4 Cush. 243, that court said: "By the word 'necessity' in the exception we are not to understand a physical and absolute necessity, but a moral fitness or

propriety in the work and labor, done under the circumstances of any particular case, may well be deemed necessity within the statute." It is, as we believe, morally fit and proper that a telegraph company should receive and transmit messages on Sunday, where it is necessary to prevent serious loss. What was said by the court in *McGatrick v. Wason*, 4 Ohio St. 566, is peculiarly applicable here. "Nor will it do," said the court, "to limit the word 'necessity' to those cases of danger to life, health, or property which are beyond human foresight or control. On the contrary, the necessity may grow out of, or indeed, be incident to, a particular trade or calling, and yet be a case of necessity within the meaning of the act."

We collect and cite a few of the many cases sustaining our conclusion: *Hennesdorf v. State*, 25 Tex. App. 597; *Ashbrandt v. State*, 25 Tex. App. 599; *Dixon v. State*, 76 Ala. 89; *Parmalee v. Wilks*, 22 Barb. 539; *Murray v. Commonwealth*, 24 Pa. St. 270.

As the appellee's complaint shows that the contract was made on Sunday, the burden is upon him to show that a necessity existed for making the contract on that day. *Troewert v. Decker*, 51 Wis. 46. This is so because he seeks to enforce a penalty inflicted by way of punishment, and not given by way of compensation. It is essential to his cause of action that he should show a valid contract. The case is not governed by *Heavenridge v. Mondy*, 34 Ind. 28, for here the action is to recover a statutory penalty, and the plaintiff must show an effective contract in order to bring himself within the terms of the statute, on which alone his action is based. Here, too, the act contracted for was within the usual vocation of the telegraph company; and, as it was done on Sunday, and the contract for its performance made on that day, the contract was *prima facie* invalid. Principle and authority require that in order to enable the plaintiff to recover a statutory penalty for an act done on Sunday he should show that the defendant was guilty of a wrong, and to accomplish this it is incumbent upon him to show that the contract was legal.

Telegraph Co. v. Yopst.

One who procures another to make a contract forbidden by law ought not to be permitted to avail himself of the contract to enforce a statutory penalty for a breach of duty springing from the contract, unless he shows that there was a necessity for making the contract, and so brings his case within the exception created by the statute.

Where a plaintiff undertakes to plead and avoid a defense, his complaint will be bad if he does not avoid the defense he assumes to state. If he states a valid defense without avoiding it, he destroys his cause of action. He is not bound to anticipate a defense; but if he undertakes to do so, and goes no further than to state a defense, he nullifies his complaint. *Locke v. Catlett*, 96 Ind. 291, 294; *Keepfer v. Force*, 86 Ind. 81; *Reynolds v. Copeland*, 71 Ind. 422.

To avoid the defense which the statute forbidding the making of contracts on Sunday creates, it was incumbent upon the plaintiff, after having alleged that the contract was made on Sunday, to plead facts showing that there was a reasonable necessity for making the contract on that day, and that the defendant knew of this necessity. If a defendant enters into a contract prohibited by law he cannot be compelled to perform it, or to respond in damages to the person with whom he contracts. An illegal contract cannot, as between the immediate parties, be the source of a legal right. Where the only road to a recovery is by way of an illegal contract, the courts will not assist the parties to the contract in traveling it; but where there can be a recovery without the aid of the illegal contract, a recovery may be adjudged. *Pape v. Wright*, 116 Ind. 502; *Louisville, etc., R. W. Co. v. Buck*, 116 Ind. 566. Here there can be no recovery if the contract was illegal, since the entire right of the plaintiff is founded on the contract, and without it the asserted right can have no legal existence. *Western U. Tel. Co. v. Wilson*, *supra*.

The plaintiff in such a case as this may show a reasonable necessity and notice of that fact from the contents of the telegram itself, or he may show knowledge by extrinsic facts. There may, we say, be cases where the tele-

gram would impart knowledge, but this is not one of them, for there is nothing on the face of the telegram conveying information that there was any necessity for receiving or transmitting it on Sunday; on the contrary, so far as the words of the telegram show, it was an ordinary message that might have been sent on any secular day. If there is any reasonable necessity shown, it is shown by the extrinsic facts averred, and not by the words of the telegram, for the language of the telegram is: "Bring forty dollars if you want record."

The demurrer to the complaint is not to each paragraph, but it is addressed to the entire pleading, so that if there is one good paragraph there is no error in overruling the demurrer. We are therefore only required to ascertain and decide whether any one of the paragraphs of the complaint is good. As we have said, the contract which lies at the foundation of the action was, as the complaint shows, made on Sunday, and as it was made on that day the complaint is bad unless it shows two essential facts in avoidance of the statutory condemnation of Sunday contracts; these essential facts are a reasonable necessity for sending the message, and notice to the company of that necessity. Our opinion is that one of the paragraphs does show a reasonable necessity for receiving and transmitting the message on Sunday, and that the defendant had notice of this fact. Although the allegations upon this point are very vague and indefinite, we adjudge them sufficient on demurrer, since the remedy for uncertainty is by motion, and not by demurrer.

Where the agent of a telegraph company declines to receive compensation for transmitting a message, and requests the sender to allow the expense to be paid by the person to whom the message is sent, the company can not escape liability on the ground that compensation was not paid at the time the message was delivered to the agent by the sender. It is a familiar rule that a party cannot escape liability if he, by his own act, makes a tender unnecessary or unavailing. This was the effect of the act of the appellant's agent.

The sixth paragraph of the appellant's answer sets forth the written contract, under the terms of which the message was received. As there was a written contract, it must be regarded as containing the whole agreement of the parties. Both parties are, of course, bound to do what that contract requires. A failure on the part of one to comply with its terms destroys his right to enforce it against the other, or to derive any statutory rights from it. The telegraph company undertook to transmit the message only upon the consideration that the plaintiff should perform his part of the contract. It was bound to do what it agreed, and so was the plaintiff. If the plaintiff failed to do what he undertook to do, he had no rights under the contract, and, as the cases we have referred to hold, if he had no rights under the contract, he could not recover the statutory penalty. To invest him with the right to recover the penalty he must have a valid contract, and must do what he agreed in that contract to do. The contract is not simply blended with his cause of action, but it constitutes its foundation. Where, as here, a duty exists only by virtue of a contract, a penalty affixed to a breach of that duty can not be recovered, unless the party seeking a recovery shows that he has done what the contract requires; for, if he has not, he has no rights under the contract, and in the absence of such rights he can not enforce the statutory penalty. It seems quite clear to us that, where a right to a statutory penalty depends upon the fact that a contract was entered into creating the duty, the breach of which gives a right of action, no right of action can exist unless the plaintiff has himself performed his part of the contract. If it were otherwise, then a party might recover for a breach of duty created by the contract, and yet not be able to enforce the contract. It would be strange, indeed, if a party could collect a statutory penalty for a breach of duty that, without the contract, could not exist, and yet have no right to maintain an action on the contract which was the source from which the duty sprung.

It is held in many cases, and none to the contrary have been cited, that a contract requiring notice can not be enforced unless the notice provided for has been given. *Young v. Western U. Tel. Co.*, 65 N. Y. 163; *Heimann v. Western Union Tel. Co.*, 57 Wis. 562; *Cole v. Western U. Tel. Co.*, 33 Minn. 562; *Wolf v. Western U. Tel. Co.*, 62 Pa. St. 83; *Western U. Tel. Co. v. McKinney*, 2 Texas Ct. of App. (Wilson), sec. 644. In the case last named it was said: "This stipulation was a condition precedent to the appellee's right to recover. * * * Until he had performed it he had no cause of action." But our own decision settle the general question against the appellee. *Western Union Tel. Co. v. Jones*, 95 Ind. 228 (48 Am. R. 713); *Western U. Tel. Co. v. Meredith*, 95 Ind. 93; *Western Union Tel. Co. v. Wilson*, *supra*. We conclude that where a contract is essential to the existence of a duty, and it contains a stipulation requiring the plaintiff to give a written notice of a default on the part of the telegraph company, the failure to give the notice required by the contract will defeat an action to recover the penalty attached to a violation of the duty created by the contract.

In holding that the written notice is required, we have not disposed of the questions presented by the answer. Another material question remains, and that is this: Does the contract provide for a written demand in cases where there is no transmission of the message? The provision in the contract is this: "The company will not be liable for damages in any case where the claim for damages is not presented in writing within sixty days after sending the message." The time fixed by the contract is 60 days from the time of sending the message. The contract thus definitely names the time, and in doing this specifies the cases in which the limitation it designates shall apply. By the words of the contract the cases to which the limitation applies are those in which the message is sent. If this be true, and we can not perceive why it is not, then where there is no transmission of the message, but a total failure to transmit, there is no limitation fixed by the contract, and

no written notice or demand is required to fix the liability of the company. It is evident from the words of the contract themselves that it is only in cases where the message is sent or transmitted that a written demand is required. There is no valid reason why the words of the contract should be extended in favor of the company to cases which they do not embrace. The limitation is for the benefit of the company, and is of its own creation. It has no right, therefore, to ask that the contract be extended for its own benefit beyond the letter of the instrument. Nor is there any ambiguity in the language employed, for it clearly designates the cases in which the limitation shall apply. The company is invested with comprehensive powers and rights, and is by law charged with duties to the public in consideration of the rights and franchises granted to it. It is impressed with a public character, and its duties are similar in many respects to those of a common carrier. *Hockett v. State*, 105 Ind. 250 (55 Am. R. 201). It ought, not, therefore, to be permitted to successfully insist that a limitation of its own creation, and established for its own benefit, should be extended beyond the words creating the limitation.

In *Western U. Tel. Co. v. Meredith*, *supra*, there was a failure to transmit and to deliver; here there was an utter failure to transmit, so that the decision in that case does not apply. There was here no effort made to transmit the message. The point as it is here presented did not arise in that case, and it is, therefore, not authoritative. If the company had sent the message, but failed to deliver it, the decision referred to would be relevant; but as it did not send the message over the wires, the limitation in the contract does not apply, as it is only of force in cases where the message is transmitted, or, in the language of the contract, from the time of "sending the message."

The breach of duty occurs as in favor of a plaintiff when a valid contract is made, and there is a failure to do what the contract and the statute require. *Carnahan v. Western U. Tel. Co.*, 89 Ind. 526. But the limitation imposed by

the corporation does not then take effect, for, to repeat what we have said, that limitation takes effect from the time of sending the message, and, if no message is sent, no limitation takes effect. The limitation, as in favor of the company, is only effective when the company so far does its duty as to transmit the message delivered to it under a valid contract. The rights of the company under the limitation depend entirely upon the contract between the company and the sender of the message. In a proper case it constitutes a defense, but only in such a case. The rights of the sender do not depend upon the limitation, but they may be defeated by it in a case falling within the terms of the contract. In favor of the sender the contract requires both a transmission over the wires and a delivery of the message. *Western Union Tel. Co. v. Lindley*, 62 Ind. 371. But the limitation benefits the corporation only when it has in part done its duty; for no advantage arises from the limitation in case there is a total failure or refusal to do what the law requires.

We need not decide whether the replies to this answer are or are not sufficient, for, conceding that they are bad, no benefit will accrue to the appellant, for a bad reply is good enough for a bad answer.

Objections to testimony must be specific. General objections are unavailing. *Ohio & R. W. Co. v. Walker*, 113 Ind. 196. Only objections properly made in the trial court can be considered on appeal.

Under these long-settled and familiar rules the only specific objection to the testimony of the plaintiff as to declarations made by Duessner, the agent of the appellant, is this: "No other person can bind the company except the one with whom the business is transacted at the time." This objection, as stated, is not valid. If Duessner was the general agent of the corporation, then his declarations would bind it, whether made at the time the contract was entered into or not. The objection does not present the question as to the nature and scope of the agent's authority, but simply challenges his authority to bind the corporation

by declarations not made when the contract was entered into. There may be cases where a foreign corporation may be bound by the declarations and acts of an agent in charge of its business at a town or city, and we can not say that this is not such a case. *Commercial, &c. Co. v. State, ex rel.*, 113 Ind. 331. But, however this may be, the objection, as stated, simply requires us to decide whether any agent other than the one who made the contract can bind the corporation by declarations made subsequent to the contract, and, as it is certain some agent may, indeed must, have authority to so bind the corporation — since a corporation acts only by agents — the objection is not well taken.

We must, of course, decide the case upon the uncontradicted evidence adduced by the appellee, since, as we have again and again decided, we are bound to act upon the evidence which the court or jury deemed trustworthy. The question, therefore, is this: Is there evidence directly proving, or from which it may be justly inferred, that the work done at the instance of the appellee was one of reasonable necessity? If it was simply a work of convenience the finding can not stand, for matters of convenience can not take a case out of the statute. The evidence of the appellee shows that he was employed, as a stenographer, to report and transcribe the evidence given on the trial of the case of *Atkinson v. The Great Southern Railway Company*, and T. C. Annabel was one of the attorneys in the case. The motion for a new trial was overruled on the 20th day of January, 1883, and 60 days' time given in which to file a bill of exceptions. In the following month the appellee was ordered to prepare a long-hand report of the evidence. This work he completed on the day the telegram was deposited in the appellant's office, which was on the 18th day of March. The appellee says in his testimony that from the time the transcript was ordered until it was completed "he put in every moment of time he could." Annabel, the attorney, lived at Goodland, and the appellee at Logansport. The judge by whom the bill of exceptions was to be signed was holding court at Lafayette. This is the evidence most favorable to the appellee, and our judg-

ment is that it fails to show a reasonable necessity for sending the telegram on Sunday. There is, upon this point, an utter failure of evidence, for the utmost effect that can be assigned the testimony is that the sending of the message was a matter, not of necessity, but of convenience. For anything that appears, the trains may have been so frequent as to have enabled the appellee to have readily accomplished all he desired by sending his message on Monday.

It does, in fact, appear that the attorney did get the report in time to go to Lafayette, and have his bill signed. It does not appear that there was any reason why the message was not sent on Saturday, and the clear inference is that on that day the appellee knew when the report would be completed. The burden is on the appellee to establish an exception to the general rule prescribed by the statute, and this he can not do by proving facts showing simply a matter of convenience. His proof, at all events, falls far short of establishing a case of necessity. Our conclusion upon this point is fully supported by authority. *Mueller v. State*, 76 Ind. 310; *Shaw v. Williams*, 87 Ind. 158; *Johnson v. Irasburgh*, 47 Vt. 28; *McGrath v. Merwin*, 112 Mass. 467; *Connolly v. City of Boston*, 117 Mass. 64.

Under the rule laid down in *Mueller v. State*, *supra*, the appellee ought to have done on Saturday what he did on Sunday.

Judgment reversed, with instructions to sustain the appellant's motion for a new trial.

Petition for a rehearing overruled April 5, 1889.

NOTE.—It does not clearly appear under which of the Indiana statutes this case arose; whether under the act of 1885, referred to in the note to *Hadley v. W. U. Tel. Co. ante*, p. 542, or in the earlier act, as to which see *W. U. Tel. Co. v. McKibben, ante*, p. 525.

See INDEX to this and to previous volume, titles "Limiting Time," "Sunday Contract," "Prepayment."

In *Blakeney v. W. U. Tel. Co.*, decided at *nisi prius*, in Evansville, Indiana, according to an editorial in 22 Cent. L. J. 147, it was held that in an action for damages for non-delivery of a telegram, the addressee can not recover for mental injury alone.

AKIN V. THE WESTERN UNION TELEGRAPH COMPANY.

Iowa Supreme Court, June 10, 1888.

(69 Iowa, 31.)

UNREPEATED TELEGRAM.—BURDEN OF PROOF.—RIGHT OF ADDRESSEE.

A principal may recover against a telegraph company for negligence in the transmission of a telegram presented by his brokers in relation to his business.

In case of an unrepeatd message, the burden is upon the plaintiff to show that the mistake occurred by the negligence of the company and not by some uncontrollable cause.

As bearing on the question of his good faith and that he acted upon the dispatch, the addressee, plaintiff, held properly allowed to testify how he interpreted the telegram as received by him.

APPEAL from Page District Court. Action for damages for error in transmission of telegram.

Appeal by defendant from judgment upon verdict.

W. F. Thummel, for appellant.

N. B. Moore, for appellee.

BECK, J.: I. The plaintiff, who was a dealer in live-stock, sent to his brokers, William Young & Co., Chicago, a telegraphic message, in the following language: "What will fifteen hundred young western cattle, corn-fed, bring?" The brokers gave to defendant for transmission a reply to this dispatch in these words: "If good quality, five eighty-five to six cents." The reply as transmitted and delivered to plaintiff reads as follows: "If good quality, give eighty-five to six cents." Upon receiving this dispatch, plaintiff, relying thereon, purchased a large number of cattle, giving therefor \$5.75 per hundred pounds. He understood the

reply to direct him to give for cattle of the description specified \$5.85 to \$6 per hundred pounds. The cattle thus purchased were shipped to Chicago, and sold by his brokers at the ruling rate for such cattle — \$5.90 per hundred pounds. The reply, as written by the brokers and delivered to defendants, correctly stated the market price of cattle of the quality mentioned.

Plaintiff lost \$309.80 upon the shipment, and brings this action to recover that sum. The reply sent by the brokers was written upon paper which contained a printed condition to the effect that the defendant "shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." The message involved in this case was not repeated. The condition printed upon the message provides that defendant may charge for repeating a message one-half the regular rate in addition thereto. The message was received and sent subject to these conditions.

II. The plaintiff demurred to defendant's answer. The demurrer was sustained as to the fourth count of the answer, and overruled as to the other counts. Of the ruling sustaining the demurrer to the fourth count of the answer defendant now complains. This count pleaded, as a defense, that the contract for the transmission of the message was not made with plaintiff, but with his brokers, and for this reason plaintiff cannot sue thereon. It is alleged in the count that the contract set out in the conditions above stated is valid and enforceable. Counsel for defendant insists that the court below held in the ruling sustaining the demurrer that it was not competent for defendant to limit its liability by the conditions of the contract. It clearly appears that the court below did not intend, and indeed did not make, any such ruling. It was held therein, and nothing more, that plaintiff could maintain the action for the mistake in transmitting to him the reply of his brokers. Other counts of the demurrer, raising the very point which

counsel claim was decided by the ruling on the count of the answer, were overruled. It appears that the ruling complained of by the plaintiff was made.

III. The plaintiff testified that the dispatch directed him to give from \$5.85 to \$6 per head for the cattle. To this evidence defendant renews his objection in this court. We think the plaintiff is competent. It tends to show plaintiff's good faith in chasing the cattle at the price he gave for them. The fact that he acted upon the dispatch in making his purchase is evidence that does not bear upon the question whether the plaintiff, in the exercise of ordinary diligence and care, was authorized to interpret the language of the dispatch as he did. That question was not affected by the testimony of the defendant, and defendant was free to establish, in a proper case, that the dispatch was not capable of being understood by ordinarily intelligent men as plaintiff understood it.

IV. The District Court gave to the jury the following among other, instructions:

"(1) That the burden of proof is on the plaintiff to establish his claim or cause of action against the defendant as alleged in his petition, and before he would recover he must prove, by a preponderance of the evidence, that he sent and received the message described in his petition."

of mistakes occurring through or on account of negligence or carelessness of the agents or employés of the defendant. Notwithstanding this regulation or special agreement, it would be the duty of the defendant to employ skilful operators, use proper instruments, and, through its agents and employés, to exercise ordinary and reasonable care in the transmission of messages ; and in this case, if you find and believe from the evidence that there was a mistake made by the defendant in the message sent by said young & Co. to the plaintiff, and that the plaintiff relied and acted on the message as he received it from the hands of the defendant, and has sustained damages thereby, then you should find for the plaintiff, unless you find that said mistake was occasioned by and through some uncontrollable cause, which a skilful operator, by the use of ordinary and reasonable care, could not have avoided ; and the burden would be on the defendant to show that the mistake was caused by some uncontrollable cause, which a skilful operator, with a good instrument, with reasonable care and caution, could not have avoided."

This instruction holds, in effect, that plaintiff is entitled to recover upon showing, with other matters which need not be mentioned, that the defendant's employés made the mistake shown in the pleadings and evidence ; that the condition of the contract for the transmission of the message relieved defendant of liability for mistakes occurring from uncontrollable causes, but did not exempt it from liability for the negligence of its employés ; and that the burden of proof rests upon defendant to show that the mistake occurred from uncontrollable causes. This instruction, in this regard, is in conflict with the doctrine announced by this court many years ago, and ever since recognized, in *Sweatland v. Illinois & Mississippi Tel. Co.*, 27 Iowa, 433. The condition of the contract for transmission of the message in that case is substantially like the one involved in this. This court then held that "the plaintiff, to recover, must prove something more than a mistake and damage. He must show that the mistake was caused by the fault of

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the defendant, and that it might have been avoided if the defendant's instruments had been good ones, and if defendant's agent had possessed the requisite skill, and exercised the proper care and diligence, in respect to the transmission and receipt of the message in question."

The instruction above quoted not only imposes liability upon defendant upon simple proof of the mistake, without evidence of negligence, but imposes upon defendant the burden of proving that there was no negligence, for the reason that the mistake occurred through uncontrollable cause. It makes the defendant liable without proof of negligence, and does not permit escape of liability, except upon proof made by defendant that there was no negligence. The instruction is not only in conflict with the prior decision of this court, but is clearly wrong upon principle.

For the errors in it, the judgment of the District Court is REVERSED.

NOTE.—See INDEX to this and to previous volume, titles "Limiting Liability;" "Burden of Proof;" Receiver or Addressee." See notes, vol. 1. pp. 39, 44, 82.

See note to next case; also to *W. U. Tel. Co. v. Longwill*, post.

In *Baxter v. Dominion Tel. Co.*, 37 Upper Canada, Q. B. 470 (1875), held that a telegraph company was not liable for non-transmission of an unrepeated message.

In *Clarence Gold Mining Co. v. Montreal Tel. Co.*, 8 Quebec Law Reports, 94 (1881), held that the sender of a telegram is bound by the printed conditions in the blank which he uses.

HARKNESS V. THE WESTERN UNION TELEGRAPH COMPANY.*Iowa Supreme Court, Oct. 26, 1887.*

(73 Iowa, 190.)

DELAY OF HALF-RATE TELEGRAM.

A dispatch was delivered by one agent of plaintiff to the defendant for transmission to another agent of plaintiff, in the plaintiff's business. Held, that plaintiff could recover the damages sustained by her by reason of negligent delay in transmission.

The dispatch not being delivered until three days after it was presented for transmission, and the delay being unexplained, held that negligence was properly found.

The usual stipulation limiting the liability of telegraph companies in respect to half-rate messages does not protect them against the consequences of their own negligence.

Case of this series cited in opinion: *Manville v. W. U. Tel. Co.*, vol. 1, p. 92.

APPEAL from District Court, Montgomery county.

Action for damages caused by negligent delay in transmission of telegram. Appeal by defendant below from judgment upon trial by court without jury.

W. F. Thummel, for appellant.

F. P. Greenlee, for appellee.

SEEVERS, J.: The material facts are that the plaintiff is a resident of the State of Iowa, and had a suit pending in the State of Nebraska, which it was expected would be reached for trial on the 13th day of October, 1884. W. C. Sloan, one of the plaintiff's attorneys, was a resident of the State of Nebraska, and A. M. Walters was also her attorney, who, however, was a resident of the State of Iowa. Both said attorneys were expected to take part in the trial

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of the suit. The plaintiff intended to start from her home in Iowa with her witnesses and attorney on the morning of the 29th of October, so that she could be present when the case was called for trial on the following day. During the night of the 27th of October a message was delivered to the defendant in these words :

“ FAIRMOUNT, Neb., October 5, 1884.

“ *To A. M. Walters, Villisca, Iowa:* Do not come till November 5th.
Court adjourned till then. W. C. SLOAN.”

Such message was a half-rate or night message, and Sloan paid the defendant 40 cents for transmitting the same. The message was received at Villisca, October 28th, about 1 o'clock A. M., at which place Walters resided, but was not delivered to him until October 31st. Plaintiff started to Nebraska on October 29th, with her witnesses and attorneys, and thereby incurred expenses which she paid, and this action is brought to recover the same of the defendant, who had no knowledge for what purpose the message was sent, other than is disclosed on its face. Nor had the defendant any knowledge that Sloan was acting for the plaintiff, or that she had a suit pending in Nebraska. The contract was made with Sloan, and is attached to the message, the material portion of which is as follows :

“ Form No. 45.

“ THE WESTERN UNION TELEGRAPH COMPANY.

“ NIGHT MESSAGE.

“ The business of telegraphing is subject to errors and delays, arising from causes which cannot at all times be guarded against, including sometimes negligence of servants and agents whom it is necessary to employ. Errors and delays may be prevented by repetition, for which, during the day, half-price extra is charged in addition to the full tariff rates.

“ The Western Union Telegraph Company will receive messages, to be sent without repetition during the night, for delivery not earlier than the morning of the next ensuing business day, at reduced rates, but in no case for less than twenty-five cents tolls for a single message, and upon the express condition that the sender will agree that he will not claim damages for errors or delays or for non-delivery of such messages happening from any cause, beyond a sum equal to ten times the amount paid for transmission, and that no claim for damages shall be valid unless presented in writing within thirty days after sending the message.”

I. It is objected that the court erred in rendering judgment for the plaintiff, because the message was neither sent by nor to her, and no contract was made with her. The court was justified in finding that both Sloan and Walters were the agents and attorneys of the plaintiff, and that the telegram was sent by one of them, and received by the other, for the use and benefit of the plaintiff. Therefore, she may well be said to be an undisclosed principal, and in such case we understand the rule to be that such principal, as the "ultimate party in interest, is entitled, against third persons, to all advantages and benefit of such acts and contracts of his agents," and the principal may sue in his own name on the contract. Story Ag., § 418; *Insurance Co. v. Allen*, 116 Mass. 398; *Gage v. Stimson*, 26 Minn. 64; S. C., 1 N. W. Rep. 806. The fact that the defendant had no knowledge that the plaintiff was, in fact, principal, and that the telegram was sent for her use and benefit, is immaterial, except that it may be true that the defendant may set up as a defense any matters that would constitute a defense if the suit was brought in the name of the agent, which occurred prior to the disclosure of the principal.

II. It is insisted that the court erred in finding that the defendant was negligent in failing to deliver the telegram earlier than it did. It will be observed that the telegram was received by the agent of the defendant at Villisca, Iowa, on the morning of the twenty-eighth of October, and that it was not delivered until the thirty-first day of that month. The court was justified in finding that defendant was negligent, because no excuse whatever for the failure to deliver the telegram on the twenty-eighth day of October is given. The delay was such as to cast on the defendant the burden of explaining the cause of the delay.

III. It is insisted that the contract limits the liability of the defendant, and that the recovery cannot exceed such limit. It has been held that it is competent for a telegraph company to restrict its liability, as was done in this case, but that it cannot contract against its own negligence in

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failing to transmit and deliver the message. *Sweatland v. Ill. & Miss. Telegraph Co.*, 27 Iowa, 433; *Manville v. West. U. Telegraph Co.*, 37 id. 214. But it is urged that the contract was made with Sloan, and that he can only recover the amount stipulated in the contract, for the reason that the money expended by him was the amount paid for the message, and that this is the extent of the plaintiff's recovery, for the reason that she is an undisclosed principal, and not known in the transaction. We do not concur in this proposition, but think that, as the telegram was sent and received for the benefit and use of the plaintiff, she may recover such damages as she has sustained, subject only to any payments in liquidation of damages made by the defendant to Sloan prior to the time defendant had knowledge that the telegram was sent for the use of the plaintiff, and that she was the principal in the transaction.

IV. It is further insisted that the plaintiff recovered \$24.52 more than in any event she was entitled to. We deem it sufficient to say we cannot concur in this proposition. AFFIRMED.

NOTE.—See INDEX to this and to previous volume, titles: "Limiting Liability;" "Half-rate Messages;" "Damages."

See note, vol. 1, p. 99.

In addition to this and the preceding case, see the following Iowa cases in vol. 1, upon the liability of telegraph companies as carriers of dispatches: *Manville v. W. U. Tel. Co.*, p. 92; *Turner v. Hawkeye Tel. Co.*, p. 208; *Given v. W. U. Tel. Co.*, p. 766; *Pennington v. W. U. Tel. Co.*, p. 834.

WESTERN UNION TELEGRAPH COMPANY v. JESSE C.
CRALL.

Kansas Supreme Court, Jan., 1888.

(88 Kan. 679.)

UNREPEATED MESSAGE.—GROSS NEGLIGENCE.

A telegraph company cannot, by stipulations contained in its printed blanks, avoid its liability for gross negligence in the transmission of dispatches.

Three errors in a telegram of nine words, there being no electrical disturbance, held, *prima facie* proof of gross negligence.

Cases of this series cited in opinion : *Tyler v. W. U. Tel. Co.*, vol. 1, p. 14; *Tel. Co. v. Griswold*, vol. 1, p. 329; *W. U. Tel. Co. v. Tyler*, vol. 1, p. 115; *Bartlett v. W. U. Tel. Co.*, vol. 1, p. 45; *Candee v. W. U. Tel. Co.*, vol. 1, p. 99; *Ayer v. W. U. Tel. Co.*, *post*; *Turner v. Hawkeys Tel. Co.*, vol. 1, p. 208.

COMMISSIONER'S decision. Appeal by defendant below from a judgment rendered in District Court, Atchison county, in an action for damages for erroneous transmission of a telegram.

The facts appear in the opinion.

Waggener, Martin & Orr, for plaintiff in error.

Tomlinson & Eaton, for defendant in error.

HOLT, C.: On September 19, 1883, Jesse C. Crall, the defendant in error, by his son and agent, Graham Crall, delivered to the defendant company, at Atchison, Kan., the following message, leaving out printed matter, etc. :

“ To J. B. Smith, Esq., Eureka, Kansas : Ship Bones, sulky, and trap to Valley Falls, immediately. GRAHAM CRALL.”

Telegraph Co. v. Crall.

The message received by Smith on the same day, at Eureka, omitting printed matter, etc., was as follows:

"To J. B. Smith: Ship Bones, sulky, and traps to Neosha Falls, immediately."
GRAHAM CROLT."

"Bones" was the name of a trotting horse owned by Crall, and at that time in charge of Smith at Eureka. He immediately shipped the horse, sulky, and traps to Neosha Falls, where they remained several weeks before Crall ascertained where they were. Smith, being only temporarily in charge of the horse, left Eureka, and Crall had no communication from him, nor did he know his whereabouts, until after the horse was found at Neosha Falls, although he made diligent inquiry for him. Trial was had at the January term, 1886, in the Atchison District Court, and, a jury being waived, the court specially found that the message in the dispatch was very plainly written, in a large round hand, so that no word in it could have been mistaken for any other word, if examined even with the slightest care; that the weather was fair and pleasant on and during all of the day on which the said dispatch was sent, both at Atchison and Eureka, and that there was no evidence of any electrical disturbance at any place on the line between said points. The seventh finding of fact is as follows:

"There is no similarity in the telegraphic symbols or characters, nor in the sound made by the instrument in forming said symbols or characters, between the words, 'Valley' and 'Neosha,' and, there being no electrical disturbance, the three mistakes in the transmission of said message were the result of the gross negligence of the defendant's operators, or the gross negligence of the defendant in keeping instruments and appliances that were out of order, and not in proper condition for use."

Crall brought his action against the telegraph company for the expense of keeping the horse, loss of its use, etc.; judgment was rendered for the plaintiff for \$136.10, and costs. The defendant company brings the case here for

review. For a defense the defendant relied upon the contract printed above the message sent by Graham Crall. It is as follows :

“THE WESTERN UNION TELEGRAPH COMPANY.

“All messages by this company are subject to the following terms :

“To guard against mistakes or delays, the sender of a message should order it repeated ; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same ; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

“Correctness in the transmission of a message to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz.: One per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employe of the company is authorized to vary the foregoing.

“No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices ; and, if a message is sent to such office by one of the company’s messengers, he acts for that purpose as the agent of the sender.

“Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the costs of such delivery.

“The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message.”

Immediately above the dispatch, in print was :

“Send the following message, subject to the above terms, which are hereby agreed to.”

The defense the telegraph company interposed will require an examination of the legal effect of this contract,

to determine the liability, if any, of the defendant to the plaintiff. In the first place, it is well enough to consider the circumstances under which such contracts are usually made. The demand for haste and dispatch, upon which the business of telegraphy is based, virtually compels the sender of a message to accept the terms offered; often he has no choice in the selection of the company to do the work required, and then, a single message is of comparatively little interest to the company—simply the remuneration for sending it—while it may be of great importance to the sender. He would probably have his right of action against the company to compel it to make a reasonable contract with him, for, to a certain extent, telegraph companies are *quasi* public servants, and owe the public certain duties, as they can exercise the right of eminent domain, and receive franchises. But he does not wish to be forced to compel it to make a fair and reasonable contract; his object is to have his message sent promptly, and he would therefore accept hard conditions at the hands of the company, rather than delay his business, and seek redress in the courts. Under such circumstances the parties are not dealing on an equal footing. When the company has such an advantage, in consequence of the nature of its employment, it can easily dictate terms. It should not, however, be sustained in treating its patrons unfairly and inequitably, and supported in unconscionable contracts made under such circumstances. *Telegraph Co. v. Graham*, 1 Col. 230; *Tyler v. Telegraph Co.*, 60 Ill. 421; Gray on Communication by Telegraph, § 48.

Was the contract itself a valid one? It is not claimed by the defendant in error that the telegraph company is an insurer of a message sent, nor that it cannot make reasonable regulations for carrying on its own business, but it is urged that a telegraph company can not by contract exempt itself from all liability that may arise by reason of its own negligence in failing to provide suitable instruments, or from negligence of its operators and servants. He cites a long list of authorities that apparently support this con-

tention. However, in disposing of this matter it is not necessary to pass upon the question urged, for, in this case, it is found by the court that the defendant company was guilty of gross negligence. The provision in the contract that the company will not be held liable for unrepeatd messages, happening by negligence of its servants, beyond the amount received for the sending of the same, is not valid to relieve it from liability against its own gross negligence. It is the duty of the telegraph company, when it receives a message, and the money therefor, from the sender, to exercise care and diligence in transmitting it promptly and accurately. No contract should be sustained by the courts which would excuse it from gross negligence or wilful misconduct in performing a service undertaken for another for hire. The current of authorities to sustain this principle is unbroken. The interests are many and varied, depending upon the proper performance by it of the work it assumes; and it is against public policy that it should be allowed to stipulate for exemption from the exercise of care and diligence in this duty, which it has voluntarily taken upon itself. This rule does not make the telegraph company an insurer, but it does prevent it from evading its liabilities for its errors arising from gross negligence. *Telegraph Co. v. Griswold*, 37 Ohio St. 301; *Telegraph Co. v. Tyler*, 74 Ill. 168; *Sweatland v. Telegraph Co.*, 27 Iowa, 433; *Bartlett v. Telegraph Co.*, 67 Me. 460; *Telegraph Co. v. Graham*, 1 Col. 230; *Candee v. Telegraph Co.*, 34 Wis. 471; *Ellis v. Telegraph Co.*, 95 Mass. 226; *Ayer v. Telegraph Co.*, 79 Me. 495; same case, 10 Atl. Rep. 495.

Was the telegraph company guilty of gross negligence? It is so found by the court below, and we think the findings are abundantly supported by the evidence in the case. In a message containing nine words, besides the address and signature of the sender, there were three mistakes; it was sent over defendant's own line, on a fair day, in which there were no electrical or atmospherical disturbances; and the court especially found that there was no similarity in

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the sounds, symbols, and characters used in telegraphy for the words, "Valley" and "Neosha." There is no good reason, in the absence of atmospherical or electrical disturbances, why the message should not have been transmitted exactly as it was received. The art of telegraphy has been reduced to comparative exactness and certainty, and it was only by the gross carelessness of the operator, or the culpable imperfections of the instruments and appliances of the company, that such a mistake could have been made in transmitting the message so short a distance upon a calm, fair day.

There is no testimony introduced in this case by the defendant company, and we presume the mere production of the mutilated] message would have been sufficient to establish the gross carelessness of the defendant. It would have thrown the burden of proof upon the defendant to excuse or explain its mistakes. *Griswold v. Telegraph Co.*, 37 Ohio St. 301; *Rittenhouse v. Telegraph Co.*, 44 N. Y. 263; *Baldwin v. Telegraph Co.*, 45 id. 744; *Telegraph Co. v. Carew*, 15 Mich. 525; *Telegraph Co. v. Meek*, 49 Ind. 53; *Turner v. Telegraph Co.*, 41 Iowa, 458. The plaintiff did prove in addition that the weather was favorable for the use of defendant's wires and instruments.

We believe that the findings of the court are sustained by ample testimony, showing gross negligence on the part of the company, and that the contract, urged as a defense by the defendant, is of no legal force whatever, when it is attempted thereby to relieve the company of its gross negligence.

We recommend that the judgment be affirmed.

By the COURT : It is so ordered.

All the justices concurring.

NOTE.— Upon the rehearing of this case, reported 89 Kan. 580, the only question considered was as to the allowance of certain damages based on anticipated gains and profits. They were held to be speculative and disallowed.

See INDEX to this and to previous volume, title "Limiting Liability."

Telegraph Co. v. Howell.

Also, upon the same subject, notes at page 99 of vol. 1, and note to *Kiley v. W. U. Tel. Co.*, *post*.

See note to *West v. W. U. Tel. Co.*, *post*, for other Kansas cases.

This case is cited in the following cases in this volume: *West v. W. U. Tel. Co.*; *W. U. Tel. Co. v. Howell*.

THE WESTERN UNION TELEGRAPH COMPANY v. GEORGE
W. HOWELL.

Kansas Supreme Court, March 10, 1888.

(38 Kan. 685.)

ERROR IN TELEGRAM.—GROSS NEGLIGENCE

(Head note by the court):

When a message is delivered to a telegraph company for transmission, very plainly written, and could not be mistaken by any person possessing ordinary eyesight who would examine it with ordinary care, and there is a mistake in the transmission and a mistake is feared by the person who received it, and, at his request, the agent at the place where it is received inquires at two relay stations if the message is correctly sent, and is assured from both stations that it is, and there is no explanatory or exculpatory evidence offered on behalf of the telegraph company, a finding of the trial court that the company is guilty [of gross negligence] is supported by sufficient evidence.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Crall*, *ante*, p. 575; *Becker v. W. U. Tel. Co.*, vol. 1, p. 337.

ERROR from Atchison District Court.

Action for damages caused by error in transmission of a telegram.

The action was tried by the court without a jury.

The court made the following special findings of fact and conclusions of law:

“CONCLUSIONS OF FACT.

“1. On and before and after April 8, 1886, the plaintiff was the owner of a team of horses of about the value of \$800.00, which team was then at his place of residence at

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Downs, Osborne county, Kansas, where he was engaged in the lumber business with Howell Bros. On said day he was at Omaha, Nebraska, and desired to reach his home at Downs, by way of Salem, in Jewell county, Kansas. He went to the transmitting office of the defendant at Omaha, and wrote upon a blank furnished by defendant a message, which, together with the printed matter thereon, reads as follows :

“ Form No. 2.

“ THE WESTERN UNION TELEGRAPH COMPANY.

“ All messages taken by this company are subject to the following terms :

“ To guard against mistakes or delays, the sender of a message should order it repeated ; that is, telegraphed back to the originating office for comparison. For this, one-half of the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or non-delivery, of any unrepeatd message, whether happening by negligence of its servants, or otherwise, beyond the amount received for sending the same ; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured ; nor in any case for delays arising from unavoidable interruption in the workings of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

“ Correctness in the transmission of messages to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz.: One per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employe of the company is authorized to vary the foregoing.

“ No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices ; and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender.

“ Messages will be delivered free within the established free-delivery limits of the terminal office. For delivery at a greater distance a special charge will be made, to cover the cost of such delivery.

“ The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message.

“ THOS. T. ECKERT, *General Manager.* NORVIN GREEN, *President.*

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"Send the following message, subject to the above terms, which are hereby agreed to :

" April 8, 1885.

" *To Howell Bros., Downs, Kansas:* Have my team and a double carriage in Salem by Thursday noon.

"(12.) Paid.

GEORGE W. HOWELL.

"Read the notice and agreement at the top."

"All of said matter was printed on said blank furnished by the defendant, except that commencing with the date, and ending with the signature of the plaintiff.

"2. On the afternoon of the same day, the agent of the defendant at Downs, Kansas, delivered to the manager of the business of said Howell Bros. the telegraphic message in words and figures following, to wit:

"Form No. 1.

"THE WESTERN UNION TELEGRAPH COMPANY.

"This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message. Errors can be guarded against only by repeating a message back to the sending station for comparison; and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeatd messages beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after sending the message.

"This is an unrepeatd message, and is delivered by the request of the sender, under the conditions named above.

"THOS. T. ECKERT, *General Manager.*

NORVIN GREEN, *President.*

Number	Sent by	Rec'd by	Check.
M. S.	C. O.	2.	12 paid.

"Received at 4.06 P. M., April 8, 1885.

Dated OMAHA, Nebraska.

" *To Howell Bros., City:* Have my team and a double carriage in Salina by Thursday noon.

GEO. W. HOWELL."

"3. Said manager, doubting the correctness of said dispatch, requested the defendant's agent at Downs to ascertain at Atchison and Kansas City if the message as delivered was correct; and said agent of the defendant telegraphed to the relay offices at Kansas City and Atchison on the same evening, and was informed from both of said offices that the

body of the dispatch read as follows, namely: 'Have my team and a double carriage in Salina by Thursday noon.—
GEORGE W. HOWELL.'

"4. Said manager thereupon hired a double carriage at Downs, and sent Charles Page, a colored man, who was in the employ of plaintiff at Downs, with said team and carriage to Salina, Kansas, with instructions to get there if possible by noon of the next day to meet the plaintiff. Said Charles Paige started the same evening, and drove as far as Beloit, in Mitchell county, Kansas. It rained that night, but next morning said Charles Paige started with said team and carriage from Beloit to Salina, in Saline county, Kansas, and reached there about three o'clock in the afternoon of April 9th. The distance traveled from Downs to Salina was over a hundred miles, and the team was very much injured by the overwork upon said journey. The distance from Downs to Salem is about thirty miles.

"5. Said Charles Page having been informed of the mistake after reaching Salina, he remained there four and a half days for his team to recuperate, and he then drove back to Downs by easy stages.

"6. The message as delivered to defendant's agent at Omaha was plainly written, and the word 'Salem' was very plainly written. It could not have been mistaken for 'Salina,' nor for any other word than 'Salem,' by any person possessing ordinary eyesight who would examine it with the slightest care. The plaintiff prepaid the defendant's charge for an unrepeatd message, and no more. Neither Howell Bros. nor their manager, nor the defendant's agent at Downs nor at Kansas City nor at Atchison, inquired of the defendant's agent at Omaha whether the message as received at Downs was correct or not.

"7. The hotel and feed bills as incurred by said Charles Page on said trip was fully \$20. The use and hire of said carriage was \$10, and the wages of said colored man on said trip was fully \$7. The team was so much injured by the drive that they were not fit for use for two or three months, and one of said horses has never recovered from said injury ;

the damage to said team by said excessive drive was at least \$120.00.

“8. On May 12, 1885, the plaintiff caused to be duly served upon the defendant, through the manager of its business at Atchison, Kansas, a demand in writing for damages, by reason of the foregoing acts, giving a full statement of the items of the plaintiff's claim; which items correspond with those set forth in ‘Exhibit E,’ annexed to plaintiff's petition. Said demand also contained an intelligent statement of the nature of the plaintiff's claim, and of the difference between the message as delivered by plaintiff at Omaha for transmission, and as delivered to Howell Bros. at Downs, Kansas, after transmission; but the defendant has not paid said claim, nor any part thereof.

“9. The items of damage referred to in conclusion of fact 7 are such as may reasonably be supposed to have been in the contemplation of both parties to the suit at the time the message was sent, as the probable result of a failure of the defendant to properly transmit it, as to where the plaintiff was to be met with his team.

“10. The only evidence of negligence is such as arises from the foregoing facts; but the failure of the defendant to properly transmit the message as to the place where the plaintiff was to be met with his team was, under the circumstances, gross negligence of the defendant.

“CONCLUSIONS OF LAW.

“1. The printed conditions upon said blank do not relieve the defendant from the payment of damages resulting from the negligence of its agents and operators, nor limit the recovery to a nominal amount.

“2. The defendant is liable to the plaintiff, and the plaintiff is entitled to judgment for the sum of \$157.00.

“3. The defendant is also liable for costs of suit.”

Waggener, Martin & Orr, for plaintiff in error.

Smith & Solomon, for defendant in error.

Telegraph Co. v. Howell.

Opinion by SIMPSON, C.: The main features of this case are similar to that of *Telegraph Co. v. Crall*, just decided. All that is said in that case denying the power of the telegraph company to limit its liability by contract, so as to relieve itself against acts of gross negligence committed by its agents and employes, applies with equal force to the facts appearing in the record of this case. The point most vigorously contested, however, in this case, not arising in the other, grows out of the finding of the court that "The only evidence of negligence is such as arises from the foregoing facts, but the failure of the defendant to properly transmit the message as to the place where the plaintiff was to be met with his team was, under the circumstances, gross negligence of the defendant." The other or foregoing facts found were that the message as delivered to the defendant's agent at Omaha was plainly written, and the word 'Salem' was very plainly written; it could not have been mistaken for 'Salina,' nor for any other word than 'Salem,' by any person possessing ordinary eyesight who examined it with the slightest care;" and the further finding: "Said manager [meaning at Downs], doubting the correctness of said dispatch, requested the defendant's agent at Downs to ascertain at Atchison and Kansas City if the message as delivered was correct; and said agent of the defendant telegraphed to the relay offices at Kansas City and Atchison on the same evening, and was informed from both of said offices that the body of the dispatch read as follows, namely: 'Have my team and a double carriage in Salina by Thursday noon. GEORGE W. HOWELL.'"

It is said by counsel for plaintiff in error that the only evidence of negligence as found by the court below is the mere fact that said message was delivered reading "Salina" instead of "Salem;" and, inasmuch as the message was not a repeated message, the burden was upon Howell to show negligence other than such as might be inferred from the mere error in the transmission of the message. The cases of *White v. Telegraph Co.*, 14 Fed. Rep. 710, and *Becker v. Telegraph Co.*, 11 Neb. 87, are cited and relied

on to establish the proposition. The authorities on the other side are numerous, and are collected in the opinion of Judge HOLT in the *Crall case*.

Counsel are mistaken in their supposition, however, that the only evidence of negligence is the mere fact of mistake in the word "Salina" for "Salem." There are two other facts found that demonstrate the negligence of the telegraph company. The first is that the word "Salem" was very plainly written ; so plainly written that it could not have been mistaken for "Salina," or any other word, by any person possessing ordinary eyesight who would examine it with the slightest care. This is equal to a finding that the operating agent at Omaha did not exercise the slightest care in the transmission of the message. In the absence of the finding that the word "Salem" was very plainly written, it might with some propriety be urged that the words are similar in appearance when hurriedly written, and the mistake might easily occur in a press of business. But the finding disposes of all such theories. There is a mistake ; but the message is very plainly written, and the mistake could not occur with the slightest care. Here is something in addition to the mere fact of mistake. Then, again, the manager at Downs feared a mistake, and had the agent of the company ask both at Atchison and Kansas City for a verification of the message. This was notice to the company that a mistake was feared ; but from both places came assurances that the message as delivered was correct; that Salina was meant, and not Salem. This was an additional act of gross carelessness upon the part of the company. It may be that they were not obliged to repeat the message, or to give additional assurances of its freedom from mistake; but having done so, the company was obliged to ascertain just what the original message was, and report accordingly. If it was content to rely on a report from the relay stations, and not to inquire at the office from which the message was sent, it ought to be held responsible for an omission of duty in that respect. So the case stands thus : there is the fact of mistake; the fact that the words were

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very plainly written ; the fact that a mistake was feared, and its attention called to it, and, after inquiry, it persisted in the mistake, and these are sufficient to support the finding of gross negligence on the part of the company.

It is recommended that the judgment be affirmed.

By the COURT : It is so ordered.

All the justices concurring.

NOTE.—See INDEX to this and to previous volume, title “Duty to Customers ;” also note at page 79 of vol. 1, and note to *Fowler v. W. U. Tel. Co.*, in this volume.

See note, vol. 1, p. 99.

This case is cited in *West v. W. U. Tel. Co.*, *post*.

GEORGE WEST V. THE WESTERN UNION TELEGRAPH
COMPANY.

Kansas Supreme Court, Apr. 7, 1888.

(89 Kan. 98.)

FAILURE TO DELIVER TELEGRAM.—RIGHT OF ADDRESSEE.—DAMAGES.

(Head-note by the court) :

Where a son, for the benefit of his father, left a written message at the office of a telegraph company, properly addressed to his father, with direction to the agent to forward it immediately, and paid the amount of money demanded by the agent for the transmission and delivery of the same, and subsequently, with a full knowledge of all the facts, the father returns to his son the money paid by him to the telegraph company and fully ratifies his acts in the transaction, and the message is never delivered ; *Held*, that the father may maintain an action for a breach of the contract in his own name against the telegraph company. Where a written message, which is accepted by a telegraph company for transmission and delivery, although paid for, is never delivered on account of the gross negligence of the agents of the company ; *Held*, that the person who may maintain an action on the contract is entitled to recover against the telegraph company his actual damages caused by a breach thereof, including, also, the money paid for the transmission and delivery of the message.

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Where a telegraph company accepts a written message, and receives pay for its immediate transmission and delivery, and the agents of the company fail to transmit or deliver the same, on account of such gross negligence as amounts to wantonness or a malicious purpose, *held*, that the company will be liable, in addition to the actual damages sustained, also to exemplary damages.

Where an action is brought against a telegraph company to recover damages for a breach of contract in failing to deliver a message announcing a death, *held*, that damages cannot be recovered by the plaintiff solely for the mental anguish or suffering occasioned by the non-delivery of the message.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Howell*, *ante*, p.

W. U. Tel. Co. v. Crall, *ante*, p. ; *Logan v. W. U. Tel. Co.* vol. 1, p. 235; *Russell v. W. U. Tel. Co.*, vol. 1, p. 653; *So Relle v. W. U. Tel. Co.*, vol. 1, p. 348; *Gulf, &c. Railway Co. v. I. Levy*, vol. 1, p. 536.

On November 12, 1885, *George West* brought this action against *The Western Union Telegraph Company*, in the District Court of Shawnee county, and alleged:

“That the defendant, The Western Union Telegraph Company, was, at the time of the grievances hereinafter stated, and is now, a corporation duly organized and incorporated under the laws of the State of New York, and as such was and is doing business in the State of Kansas, and was and is owning and operating a telegraph line in the State of Kansas, between the city of Topeka, in and through Shawnee county, and the city of Delphos, Ottawa county, in the State of Kansas, and was then and is now engaged as a common carrier for hire, in sending messages for the public, by means of such telegraph, between said points.

“Plaintiff further states, that on or about the 14th day of September, 1885, he was temporarily at the city of Delphos, in the State of Kansas, and that, on or about said date the plaintiff, by his agent, John G. West, made and entered into a contract with defendant, its agents and employes, at the city of Topeka, which, in consideration of the sum of forty cents to it paid by said plaintiff, undertook, promised and agreed to transmit and deliver, without unnecessary delay, a certain telegraphic message to plaintiff at the city of Delphos, State of Kansas, where

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plaintiff was temporarily residing, as aforesaid, which message was in words and figures following, to wit:

“NORTH TOPEKA, Kansas, September 14, 1885.

“*To George West, Delphos, Kansas, care of Post-Office: Uncle Sam died last night; funeral Wednesday.* JOHN G. WEST.”

“That said plaintiff, by his agent, as aforesaid, then and there paid defendant forty cents, the regular consideration and price by it charged for transmitting and delivering said message from the city of Topeka to the city of Delphos, in the State of Kansas, which consideration was then and there accepted by defendant, and for which it agreed, without unnecessary delay, as aforesaid, to transmit said message to plaintiff at the city of Delphos, as aforesaid, and delivered the same to plaintiff in person, or in care of the post-office, at said city of Delphos, that although defendant well knew the whereabouts of plaintiff, and the post-office, in care of which said message was sent, at said city of Delphos, State of Kansas, and could and should have delivered the same to plaintiff, as aforesaid, on the same day it was sent, yet defendant, its agents and employés, maliciously, and in gross neglect of duty, failed and refused to deliver the same to plaintiff, or to the post-office, as aforesaid, within a reasonable time; but grossly and maliciously neglected and failed to deliver said message to plaintiff when called for by him in person, and never delivered the same to plaintiff, or in care of the said post-office, as by its contract it had obligated itself to and was bound to do.

“Plaintiff further avers that, at the time of the said grievances, he was seventy-three years of age, and had an only brother, Samuel C. West, who was seventy-six years of age, and who resided in Philadelphia, Pennsylvania, and that said telegram was to notify plaintiff of the death of his said brother Samuel, which was then and there to the defendant, its agent and employés, well known, and whose funeral the plaintiff desired to and would have attended

but for the gross negligence of defendant, its agents and employés, to deliver said message to plaintiff, as by the contract it obligated and bound itself to do; that the funeral of the said Samuel C. West, deceased, was deferred, so that plaintiff could attend the same, and which plaintiff intended to do and would have done if said telegram had been delivered within a reasonable time, in accordance with said contract, but in consequence of the failure and gross and malicious negligence of defendant, its agents and employés, to deliver said dispatch, as by its said contract it had obligated itself and was bound to do, the plaintiff was deprived of the satisfaction and pleasure of seeing his said brother, and being present at his funeral, and because of which plaintiff suffered great and irreparable injury, distress and mental pain and anguish, and which was great and overpowering, and was due and caused by the failure and gross and malicious neglect of the defendant, its agents and employés, to comply with, and in breach of, its said contract. And thereby, also, because of the failure of defendant to transmit and deliver said telegram to plaintiff, as it was bound to do, the plaintiff was forced to and did then and there lay out and expend large sums of money, and performed labor, to wit, ten dollars, in and about making search for and attempting to find said telegram, caused by the failure and gross and malicious neglect of the defendant, its agents and employés, to comply with and in breach of its said contract, and by its negligence.

“Wherefore, the said damages sustained, as aforesaid, by reason of the breach of contract and gross negligence of the defendant, through its agents and employés, was and is in the sum of ten thousand dollars, for which plaintiff demands judgment, costs and other relief.”

On December 8, 1885, the telegraph company filed its answer, containing a general denial. On September 30, 1886, trial was had before the court, with a jury. After George West had testified, and also had produced the evidence of John West, George W. Strickler, Delia A. Knowles, James Clark, Lizzie Strickler, Levi Reynolds and

Joseph McDonough, the telegraph company demurred to all of the testimony, upon the ground that it did not prove, or tend to prove, a cause of action in favor of the plaintiff and against the defendant. After argument, the demurrer was sustained by the court, and the case taken from the jury. Thereupon judgment was rendered by the court against the plaintiff, and in favor of defendant, for all the costs. The plaintiff subsequently filed his motion for a new trial, containing all the statutory grounds, which was overruled. He excepted, and brings his case here.

Jetmore & Son, for plaintiff in error.

J. B. Johnson, for defendant in error.

The opinion of the court was delivered by HORTON, C. J.: This was an action brought by George West against the Western Union Telegraph Company, to recover \$10,000 damages, occasioned, as claimed in the petition, by gross and malicious negligence of the company to transmit and deliver the following telegraphic message:

“NORTH TOPEKA, Kansas, September 14, 1885.

“*To George West, Delphos, Kansas, Care Post-Office: Uncle Sam died last night: funeral Wednesday.* JOHN G. WEST.”

Upon the trial, after the plaintiff had closed his evidence, the telegraph company interposed, and filed a demurrer thereto, upon the ground that no cause of action was proved. The court sustained the demurrer. The plaintiff excepted, and brings the case here for review.

The testimony introduced tended to show that the foregoing written message was handed by John West, the son of George West, to the agent of the telegraph company, at its office at North Topeka, on the afternoon of its date, with directions “to forward it immediately;” that the message was ordered by John West to be sent for the benefit of his father; that he paid the agent 40 cents for sending the mes-

sage; that subsequently his father repaid to him the money; that Delphos is about 100 miles west of North Topeka; that, at the date of the message and subsequently, it was operating a telegraph line for hire between the towns of North Topeka and Delphos, with an office in each town; that George West has resided in Kinmundia, Ill., since 1859; that in September, 1885, he was visiting in Kansas, and at the date of the message, and for several days thereafter, was with friends in the neighborhood of Delphos; that Samuel C. West was his oldest brother, and after his death that he had no other brother living; that Samuel lived at Philadelphia, Pennsylvania, and at the time of his death was 78 years of age; that George West was 73 years of age; that he was expecting to hear of the death of his brother, on account of his ill health, and was anxious to attend his funeral if notified in time; that while in Kansas he had so fixed his matters as to start at a moment's warning to attend the funeral; that on September 14, 1885, he inquired at the post-office at Delphos for his mail, but did not receive the telegram; that he inquired frequently afterwards, and sent others to inquire for his mail, but never received the telegram; that subsequently he learned, by a letter from his son, John, of the death of his brother, Samuel, but the information came too late for him to attend the funeral; that if he had received the telegram within a reasonable time after it had been sent, he could have attended the same; that his son, John, informed the agent, at the office of the telegraph company in North Topeka, that the message had never been delivered; that George West also inquired at the office of the telegraph company at Delphos on the morning of the 18th of September for the telegram; that the agent said that none had been received for him; that he then told the agent "he would investigate the matter," and he replied "he had received none, and that none could have been received without his knowing it;" that both George West and John West were informed by the agent at North Topeka that the message had been sent over the wire, at

its date, to Delphos; that the telegram was never delivered to the post-office at Delphos, or to George West, by the agent of the telegraph company, or any one else.

Upon what grounds the trial court sustained the demurrer to the evidence is not clearly disclosed. In our opinion, the demurrer should have been overruled, as there was ample evidence introduced for the case to go to the jury. The message was written and delivered at the office in North Topeka, and paid for by John West, the son of the plaintiff, for the benefit of the latter. Subsequently George West returned to his son the money paid by him to the telegraph company, and ratified and approved his son's acts in the transaction, in all respects as if the message originally had been written and sent under his direction. In *Burton v. Larkin*, 36 Kas. 246, it was held that "a person for whose benefit a promise to another, upon a sufficient consideration, is made, may maintain an action on the contract in his own name against the promisor." In *Dresser v. Wood*, 15 Kas. 344, it was held "that where an action is commenced by an attorney at law, without the knowledge or consent of the plaintiff, the plaintiff may afterward ratify the same, and thereafter be entitled to its benefits." The contract, therefore, made by the son with the telegraph company for the benefit of his father, which was afterwards approved and ratified by the father, was sufficient as the basis of this action. The plaintiff, upon the evidence introduced, was entitled to recover judgment against the defendant for his actual damages, including the 40 cents paid for the transmission of the message. *Telegraph Co. v. Howell*, 38 Kas. 685; *Telegraph Co. v. Crall*, 38 id. 679; *Logan v. Telegraph Co.*, 84 Ill. 468.

Further than this, if upon another trial it shall be established that there was such gross negligence on the part of the agents of the telegraph company as to indicate wantonness, or a malicious purpose in failing to transmit and deliver the message, then the plaintiff would be entitled to exemplary damages. Such damages are given more to punish the wrongdoer than to recompense the party injured.

Scott & J. Tel. §§ 417, 418; *S. K. Rly. Co. v. Rice*, 38 Kas. 398; Same case, 16 Pac. Rep. 817, and cases cited therein. In *Schippel v. Norton*, 38 Kas. 567, we recently held where no actual damage is suffered, no exemplary damages can be recovered; but, as actual damages are shown in this case, that decision is not applicable.

It seems, however, to be claimed upon the part of the plaintiff that he is entitled to recover for his mental anguish or suffering occasioned by the delay in the announcement of the death of his brother. Where mental suffering is an element of physical pain, or is a necessary consequence of physical pain, or is the natural and proximate result of the physical injury, then damages for mental suffering may be recovered, where the injury has been caused by the negligence of the defendant; but, in an action of this kind, we do not think that damages for mental anguish or suffering can be allowed. "Such damages can only enter into and become a part of the recovery, where the mental suffering is the natural, legitimate and proximate consequence of the physical injury." *City of Salina v. Trosper*, 27 Kas. 544. The general rule is "That no damages can be recovered for a shock and injury to the feelings and sensibilities, or for mental distress and anguish, caused by the breach of the contract except a marriage contract." *Russell v. Telegraph Co.* [Dakota], 19 N. W. Rep. 408. In *So Relle v. Telegraph Co.*, 55 Tex. 308, it was decided that an action for mental suffering alone could be maintained. The opinion in that case, however, was prepared by a member of the commission of appeals of Texas. And subsequently, in the case of *Railway Co. v. Levy*, 59 Tex. 563, the Supreme Court of Texas overruled that decision. (See also Wood's Mayne, Dam. [1st Am. Ed.] 74.)

We also add that the trial court should have permitted the plaintiff to show the arrangements made with his son John to forward to him, at Delphos, all telegrams and mail matter that came addressed to him at Topeka.

The judgment of the District Court will be reversed, and

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the cause remanded for further proceedings in accordance with the views herein expressed.

All the justices concurring.

NOTE.—See INDEX to this and to previous volume, titles “Receiver or Addressee,” “Damages.” Also, on latter subject, note, vol. 1, p. 58, and on former subject, at page 39 of vol. 1 and note to *W. U. Tel. Co. v. Longwill, post*.

JEAN DESLOTES ET AL. V. BALTIMORE AND OHIO TELE-
GRAPH COMPANY.

Louisiana Supreme Court, Feb. 13, 1888.

(40 La. An. 183.)

NON-DELIVERY OF TELEGRAM DUE TO FAULTY ADDRESS.—NON-PRIVITY.—
REMOTE DAMAGES.

(Head note by the court):

At the request of a customer, a country merchant telegraphed to his New Orleans merchant to ship two barrels of bisulphate of lime, the dispatch being addressed to 291 Rampart street. This street has two divisions, known as North and South Rampart streets, each having a number 291. The name not appearing in the directory, defendant's messenger carried the dispatch to 291 North Rampart, and, being informed by the servant that S. Kahn lived there, left the dispatch, and accepted the receipt of the householder. It turned out that Kahn lived on South Rampart; the dispatch did not reach him, and the goods were not sent. Plaintiffs, at whose request the country merchant sent the dispatch, were sugar planters, who required the bisulphate to save their cane, which had been frosted, and they sue defendant for \$2,500 for sugar and molasses lost. *Held*, there was no privity between plaintiffs and defendant, the evidence showing that the country merchant acted not as agent, but as merchant, seeking to supply himself with goods in order to sell the same to a customer at a profit, and that the goods, if shipped, would have remained his property and at his risk until sold to the customer at a price agreed. The failure to deliver resulted from the insufficient and incomplete address, and from no negligence of the defendant who pursued the customary and only practical method of conducting its business.

The damages claimed are too remote, and wanting in causal connection. There is no reason why the default of a telegraph company in delivering an order for goods should be visited with heavier penalty than the default of a common carrier in the delivery of goods actually shipped, viz., the value of the goods at the point of destination.

APPEAL from the Civil District Court of the Parish of Orleans.

Action for damages for wrong delivery of a telegram. Appeal by plaintiffs from judgment for defendant.

Facts stated in the opinion.

Leonard, Marks & Bruenn, for plaintiffs and appellants.

J. R. Beckwith, for defendant and appellee.

The opinion of the court was delivered by FENNER, J. :

On the 14th of December, 1885, I. Wildenstein, a merchant of Jeannerette, in this State, sent the following dispatch over defendant's line :

“ JEANNERETTE, La.

“ Ship without delay two barrels bisulphate in liquid.

“ I. WILDENSTEIN.

“ To S. Kahn, 291 Rampart street, New Orleans.”

S. Kahn is a small merchant in New Orleans, whose name does not appear in the city directory, and defendant had no guide to his location except the address in the dispatch.

Rampart street crosses Canal street, and above the latter is designated as South Rampart, and below as North Rampart, and the numbering in each direction begins at Canal, so that there is a 291 Rampart above and also below Canal.

The messenger charged with the delivery of the dispatch took it to 291 North Rampart street, which he found to bear the sign of Dr. Souchon. He says: “I pulled the bell, and the servant came out. I asked her if Mr. S. Kahn lived there. She said Dr. Souchon lived there. I again asked her if S. Kahn lived there, and she said ‘yes ;’

and she took the message and gave me ten cents. She signed the receipt in the name of 'Mrs. Dr. Souchon.' ”

Shortly afterwards, Wildenstein called on the operator in Jeannerette, and inquired if the message had been delivered. The operator communicated with the New Orleans office, and was answered that it had been delivered, which answer he communicated to Wildenstein.

It turned out that S. Kahn lived at 291 South Rampart street, and of course the message never reached him, and the order was not filled.

Now come the plaintiffs, Deslottes & Lejeune, who are cultivators of sugar-cane near Jeannerette, who aver that on December 14, 1885, their cane on 22 acres had been so affected by cold and frost that, in order to manufacture the same into sugar and molasses, it was necessary to have promptly two barrels of bisulphate of lime in liquid ; that, finding none of that article in Jeannerette, they requested their merchant, Wildenstein, to telegraph for it; that he did accordingly telegraph, and that if the message had been delivered the bisulphate would have been received in time to save their cane ; but that, owing to the fault and negligence of defendant in not making such delivery, it was not received, and they incurred thereby a loss of \$2,500, for which they now seek to hold defendant responsible.

Plaintiffs have no case for various reasons, viz. :

1. The evidence does not establish such privity between plaintiffs and defendant as would sustain the recovery. Wildenstein appears to have acted not as the agent of the plaintiffs, but as a merchant who, at the request of a customer, sought to supply himself with goods which the latter wanted in order to sell the same to him at a profit. The goods would have been the property, and at the risk, of Wildenstein, until sold to plaintiffs at a price agreed on.

2. The evidence does not bring home such negligence to defendant as would make it liable for the non-delivery. The failure resulted from the improper or incomplete address of the dispatch. It was addressed to No. 291 Rampart street, without designating North or South, and was deliv-

ered at No. 291 Rampart street after due inquiry and assurance that the party lived there. Had the address been 291 South Rampart street, the mistake would not have occurred. The absence of Kahn's name from the directory left defendant no means of determining which of the two Ramparts was meant, and the course pursued in making inquiry, and on being informed that the party lived in the house, taking the receipt of the householder or person receiving the dispatch, conformed to the customary and only practical method of conducting its business.

3. Moreover, the damages claimed are too remote and wanting in causal connection with the negligence complained of. The cause of plaintiff's loss was the frosting of their cane. There was nothing in the dispatch to advise defendant that, in ordinary course, any such damages might flow from a mistake in delivery. We can discover no reason why the default of a telegraphic company in failing to deliver an order for goods should be visited with heavier penalty than the default of a common carrier in failing to deliver goods actually shipped, and it is well settled that the latter is measured according to the value of the articles. Sedgwick on Damages, p. ; *Segura v. Reed*, 3 Ann. 695.

Judgment affirmed.

NOTE.—See INDEX to this and to previous volume, title “ Damages.”

The only Louisiana case in vol. 1, upon the duty and liability of telegraph companies as carriers of dispatches, is *De La Grange v. So. W. Tel. Co.*, p. 59.

Merrill v. Telegraph Co.

FRED S. MERRILL v. WESTERN UNION TELEGRAPH
COMPANY.

Supreme Judicial Court of Maine, January 19, 1886.

(78 Me. 97.)

NON-DELIVERY OF TELEGRAM.—DAMAGES.

Unless some substantial damage can be proven, caused by the inexcusable non-delivery of a telegram, only nominal damages can be awarded.

ACTION for damages. Appeal by defendant below.

Savage & Oakes, for the plaintiff.

Baker, Baker & Cornish, for the defendant.

HASKELL, J. : Damages are sought for the inexcusable non-delivery of a telegram, whereby the plaintiff was prevented from performing his contract to labor.

The plaintiff's agent completed a verbal contract, that the plaintiff should labor for a manufacturer at two dollars and twenty-five cents per day, commencing Monday, September 1, and seasonably required the defendant to transmit a message to the plaintiff, notifying him of its terms. The message was not delivered in season for the plaintiff to begin his work as stipulated, and thereby he lost his employment. The defendant denies liability beyond nominal damages.

The contract was defeasible at the will of either party. How, then, can any substantial damage be measured? Had the engagement to employ the plaintiff been for a stipulated and definite period, not over one year, the plaintiff would have a right to demand damages that could be defi-

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nately measured and assessed. He would then have been entitled to enjoy the fruit of his labor during the time of his engagement; but, under the terms of the contract in proof, he was liable to be dismissed from his employment as soon as he entered upon it, and it can not be known what damages he has suffered in the premises. The plaintiff must prove his damages before they can be assessed. The case fails to show facts that warrant greater than nominal damages. *Miller v. Mariner's Church*, 7 Maine, 51; *Blaisdell v. Lewis*, 32 Maine, 515; *True v. Int. Tel. Co.*, 60 Maine, 9; *Griffin v. Colver*, 16 N. Y. 489.

Defendant defaulted for one dollar.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and FOSTER, JJ., concurred.

NOTE.— See INDEX to this and to previous volume, title “ Damages.”
See note to *Fowler v. W. U. Tel. Co.*, *post*.

FRED W. AYER v. WESTERN UNION TELEGRAPH COMPANY.

Supreme Judicial Court of Maine, Aug. 24, 1887.

(79 Me. 493.)

ERROR IN UNREPEATED MESSAGE.— BURDEN OF PROOF.— DAMAGES.

A stipulation in a telegraph blank purporting to exempt the company from liability for damages caused by its own negligence in respect to an unrepeated message is against public policy and void.

The omission of an important word from a telegram is *prima facie* proof of negligence of the company.

The sender of a message embodying a commercial offer or acceptance is bound to the receiver by the terms of the message as delivered to the latter; and in case of loss sustained by error of the telegraph company in transmitting the dispatch, the sender has his action against the company.

Cases of this series cited in opinion: *Bartlett v. W. U. Tel. Co.*, vol. 1, p. 45; *W. U. Tel. Co. v. Shotter*, vol. 1, p. 557.

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ON report from Supreme Judicial Court, Penobscot county.

Action for damages. The facts are stated in the opinion.

Wilson & Woodruff, for plaintiff.

Baker, Baker & Cornish, for defendant.

EMERY, J.: On report. The defendant telegraph company was engaged in the business of transmitting messages by telegraph between Bangor and Philadelphia, and other points. The plaintiff, a lumber dealer in Bangor, delivered to the defendant company in Bangor, to be transmitted to his correspondent in Philadelphia, the following message :

“ Will sell 800M laths, delivered at your wharf, two ten net cash. July shipment. Answer quick.”

The regular tariff rate was prepaid by the plaintiff for such transmission. The message delivered by the defendant company to the Philadelphia correspondent was as follows :

“ Will sell 800M laths, delivered at your wharf, two net cash. July shipment. Answer quick.”

It will be seen that the important word “ten” in the statement of price was omitted.

The Philadelphia party immediately returned by telegraph the following answer :

“ Accept your telegraphic offer on laths. Cannot increase price spruce.”

Letters afterwards passed between the parties, which disclosed the error in the transmission of the plaintiff's message. About two weeks after the discovery of the error, the plaintiff shipped the laths, as per the message received by his correspondent, to wit, at two dollars per M. He testified that his correspondent insisted he was entitled to the laths at that price, and they were shipped accordingly.

The defendant telegraph company offered no evidence

whatever, and did not undertake to account for or explain the mistake in the transmission of the message. The presumption, therefore, is that the mistake resulted from the fault of the telegraph company. We can not consider the possibility that it may have resulted from causes beyond the control of the company. In the absence of evidence on that point we must assume that for such an error the company was in fault. *Bartlett v. Tel. Co.*, 62 Me. 221.

The fault and consequent liability of the defendant company being thus established, the only remaining question is the extent of that liability in this case. The plaintiff claims it extends to the difference between the market price of the laths and the price at which they were shipped. The defendant claims its liability is limited to the amount paid for the transmission of the message. It claims this limitation on two grounds:

I. The company relies upon a stipulation made by it with the plaintiff, as follows :

“ All messages taken by this company are subject to the following terms : To guard against mistakes or delays, the sender of a message should order it *repeated* ; that is, telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeat~~ed~~ message, whether happening by negligence of its servants, or otherwise, beyond the amount received for sending the same.”

This is the usual stipulation printed on telegraph blanks, and was known to the plaintiff, and was printed at the top of the paper upon which he wrote and signed his message. He did not ask to have the message repeated.

Is such a stipulation in the contract of transmission, valid, as a matter of contract assented to by the parties, or is it void as against public policy ? We think it is void.

Telegraph companies are *quasi* public servants. They receive from the public valuable franchises. They owe the public care and diligence. Their business intimately con-

cerns the public. Many and various interests are practically dependent upon it. Nearly all interests may be affected by it. Their negligence in it may often work irreparable mischief to individuals and communities. It is essential for the public good that their duty of using care and diligence be rigidly enforced. They should no more be allowed to effectually stipulate for exemption from this duty than should a carrier of passengers, or any other party engaged in a public business.

This rule does not make telegraph companies insurers. It does not make them answer for errors not resulting from their negligence. It only requires the performance of their plain duty. It is no hardship upon them. They engage in the business voluntarily. They have the entire control of their servants and instruments. They invite the public to intrust messages to them for transmission. They may insist on their compensation in advance. Why, then, should they refuse to perform the common duty of care and diligence? Why should they make conditions for such performance? Having taken the message and the pay, why should they not do all things (including the repeating) necessary for correct transmission? Why should they insist on special compensation for using any particular mode or instrumentality, as a guard against their own negligence? It seems clear to us that, having undertaken the business, they ought without qualification to do it carefully, or be responsible for their want of care.

It is true there are numerous cases in other States holding otherwise, but we think the doctrine above stated is the true one, and in harmony with the previous decisions of this court. *True v. Telegraph Co.*, 60 Me. 1; *Bartlett v. Telegraph Co.*, 62 Me. 221.

II. The defendant company also claims that the plaintiff was not in fact damaged to a greater extent than the price paid by him for the transmission. It contends that the plaintiff was not bound by the erroneous message delivered by the company to the Philadelphia party, and hence need not have shipped the laths at the lesser price. This raises

the question whether the message written by the sender, and entrusted to the telegraph company for transmission, or the message written out and delivered by the company to the receiver at the other end of the line, as and for the message intended to be sent, is the better evidence of the rights of the receiver against the sender.

The question is important and not easy of solution. It would be hard, that the negligence of the telegraph company, or an error in transmission resulting from uncontrollable causes, should impose upon the innocent sender of a message a liability he never authorized, nor contemplated. It would be equally hard that the innocent receiver, acting in good faith upon the message as received by him, should, through such error, lose all claim upon the sender. If one, owning merchandise, write a message offering to sell at a certain price it would seem unjust that the telegraph company could bind him to sell at a less price, by making that error in the transmission. On the other hand, the receiver of the offer may in good faith, upon the strength of the telegram as received by him, have sold all the merchandise to arrive, perhaps at the same rate. It would seem unjust that he should have no claim for the merchandise. If an agent receives instructions by telegraph from his principal, and in good faith acts upon them as expressed in the message delivered him by the company, it would seem he ought to be held justified, though there were an error in the transmission.

It is evident that in case of an error in the transmission of a telegram either the sender or receiver must often suffer loss. As between the two, upon whom should the loss finally fall? We think the safer and more equitable rule, and the rule the public can most easily adapt itself to, is, that as between sender and receiver, the party who selects the telegraph as the means of communication, shall bear the loss caused by the errors of the telegraph. The first proposer can select one of many modes of communication, both for the proposal and the answer. The receiver has no such choice, except as to his answer. If he cannot safely act.

upon the message he receives through the agency selected by the proposer, business must be seriously hampered and delayed. The use of the telegraph has become so general, and so many transactions are based on the words of the telegram received, that any other rule would now be impracticable.

Of course, the rule above stated presupposes the innocence of the receiver, and that there is nothing to cause him to suspect an error. If there be anything in the message, or in the attendant circumstances, or in the prior dealings of the parties, or in anything else, indicating a probable error in the transmission, good faith on the part of the receiver may require him to investigate before acting. Neither does the rule include forged messages, for in such case the supposed sender did not make any use of the telegraph.

The authorities are few and somewhat conflicting, but there are several in harmony with our conclusion upon this point. In *Durkee v. Vt. C. R. R. Co.*, 29 Vt. 137, it was held that where the sender himself elected to communicate by telegraph, the message received by the other party is the original evidence of any contract. In *Saveland v. Green*, 40 Wis. 431, the message received from the telegraph company was admitted as the original and best evidence of a contract, binding on the sender. In *Morgan v. People*, 59 Ill. 58, it was said that the telegram received was the original, and it was held that the sheriff receiving such a telegram from the judgment creditor, was bound to follow it as it read. There are dicta to the same effect in *Wilson v. M. & N. Ry. Co.*, 31 Minn. 481, and *Howley v. Whipple*, 48 N. H. 488.

Telegraph Co. v. Shotter, 71 Ga. 760, is almost a parallel case. The sender wrote his message: "Can deliver hundred turpentine at sixty-four." As received from the telegraph company it read: "Can deliver hundred turpentine at sixty," the word "four" being omitted. The receiver immediately telegraphed an acceptance. The sender shipped the turpentine, and drew for the price at sixty-four. The

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receiver refused to pay more than sixty. The sender accepted the sixty, and sued the telegraph company for the difference between sixty and the market. It was urged, as here, that the sender was not bound to accept the sixty, as that was not his offer. The court held, however, that there was a complete contract at sixty, that the sender must fulfil it, and could recover his consequent loss of the telegraph company.

It follows that the plaintiff in this case is entitled to recover the difference between the two dollars and the market, as to laths. The evidence shows that the difference was 10 cents per M.

Judgment for plaintiff for eighty dollars, with interest from the date of the writ.

PETERS, C. J., WALTON, DANFORTH, VIRGIN, LIBBEY, FOSTER, and HASKELL, JJ., concurred.

NOTE.—See INDEX to this and to previous volume, titles, “Limiting Liability,” “Burden of Proof,” “Damages.”

See notes, vol. 1, pp. 82, 99.

See note to next case.

This case is cited in the following cases, *post*: *Fowler v. W. U. Tel. Co.*; *W. U. Tel. Co. v. Way*; *W. U. Tel. Co. v. Crall*; *Gillis v. W. U. Tel. Co.*

HENRY J. FOWLER AND ANOTHER V. THE WESTERN UNION
TELEGRAPH COMPANY.

Supreme Judicial Court of Maine, June 6, 1888.

(80 Maine, 381.)

DUTY OF TELEGRAPH COMPANY.—LIMITING LIABILITY.—DESTRUCTION OF
NIGHT MESSAGE.

A telegraph company is not so far like a common carrier as to be an insurer of the safe, correct and prompt transmission of messages. It is, however, held to a high degree of diligence, and cannot stipulate away its liability for the consequences of its own negligence.

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So far as the stipulations in night-message blanks are inconsistent with the above, *e. g.*, the one purporting to exempt the company from liability for errors, etc., "happening from any cause," they are unreasonable and void.

The agreement in the blank that the message need not be delivered until the following morning, is not, however, thereby rendered invalid ; and for the destruction of the message before the stipulated time of delivery, without fault or negligence upon its part, the company cannot be held liable.

A *prima facie* case is made against a telegraph company which has received a message for transmission, by showing that it was not delivered and that damage resulted.

This is rebutted, however, by proof that the failure was due to a cause against which the company had protected itself by a valid stipulation.

Cases of this series cited in opinion: *Bartlett v. W. U. Tel. Co.*, vol. 1, p. 45; *Ayer v. W. U. Tel. Co.*, *ante*, p. 601; *W. U. Tel. Co. v. Neill*, vol. 1, p. 352; *Pinckney v. W. U. Tel. Co.*, vol. 1, p. 516; *Little Rock, &c. Tel. Co. v. Davis*, vol. 1, p. 526.

ACTION for damages for failure to deliver a half-rate or night-message. The facts are stated in the opinion.

Woodman & Thompson, for plaintiffs.

Baker, Baker & Cornish, for defendant.

FOSTER, J.: This case comes up on report. It appears that on the evening of August 20, 1883, the plaintiffs, whose business is that of pork packing, delivered to the defendants' agent at Portland, for transmission and delivery, the following night message:

"PORTLAND, August 20, 1883.

To H. F. Googins, Union Stock Yards, Ill.: Ship one car hogs to-morrow.

THOMPSON, FOWLER & Co."

The message never having been delivered by the defendants, this action is brought to recover damages alleged to have been sustained in consequence.

In defense of the action the defendant introduced evidence, and established the following facts:

At the Union Stock Yards, which are about six miles from Chicago, the defendant company had only a day office,

open from half-past 6 in the morning till 10 o'clock in the evening. Night messages directed to the Stock Yards, received at the Chicago office during the night, were necessarily kept in that office until after the opening of the office at the Stock Yards on the following morning. This dispatch was received at the Chicago office during the night of August 20-21, and the copy was hung upon what was called the Stock Yards' hook in the operating room, awaiting the opening of the office at that place on the morning of the 21st. About 30 minutes past 6 that morning, and immediately prior to the opening of the Stock Yards' office, a fire suddenly broke out in the operating room of the Chicago office, and spread with such rapidity that nothing could be saved from the room, and this copy, together with everything in the room, was destroyed.

The fire was first discovered in this room upon the back of the "switch-board," where it is covered with numerous wires necessarily running very close to each other, and was caused by the crossing of several wires charged with large batteries. This crossing resulted from atmospheric conditions, the moisture accumulating on the back of the switch-board forming a partial connection between the wires, and acting as a partial conductor, thereby causing the electric current to leave its proper course, with the result as above stated.

That such accidents are exceedingly rare is not disputed, and that there are no improvements known to the art or anywhere in use by which the possibility of such an occurrence can be prevented.

In consequence of this fire it became impossible for the defendant to deliver the plaintiffs' message.

This message delivered to the company was written upon a night message blank, and after stipulating that the company would receive messages to be sent without repetition during the night, for delivery not earlier than the morning of the next ensuing business day, at reduced rates, there followed this condition: "that the sender will agree that he will not claim damages for errors or delays, or for non-

delivery of such messages, happening from any cause, beyond a sum equal to ten times the amount paid for transmission," etc.

Above the written message were these words : "Send the following night message, subject to the above conditions, which are hereby agreed to."

No evidence was offered at the trial or question raised in reference to the stipulations and condition, further than what appears upon the message blank signed at the bottom of the message. Nor is any question raised by counsel in argument before this court in relation to the validity of such a condition as is found attached to this stipulation or agreement. By its very terms, if held valid, this condition would relieve the company from all its liability whatsoever for errors, delays, or omissions "happening from any cause." It would protect them from all liability happening as the result of their own negligence. Whatever force or effect other courts may give to such conditions, whether as a regulation of the company or as a contract between the parties, it is now too well settled by this court to admit of question or contradiction that they are unreasonable and void. *Bartlett v. W. U. Tel. Co.*, 62 Me. 209; *True v. The International Tel. Co.*, 60 Me. 9; *Ayer v. W. U. Tel. Co.*, 79 Me. 493. As in the case of common carriers, they can not contract with their employers for exemption from liability for the consequences of their own negligence. Whether such conditions are reasonable or unreasonable must be determined with reference to public policy, rather than private contract. *Express Company v. Caldwell*, 21 Wall. 270.

The defense, however, is based entirely upon other grounds. No conditions contained in the stipulation are relied upon as a defense in this action. But it is claimed that under the facts in the case, concerning which there is no controversy, the defendant company can not be deemed guilty of any negligence, and therefore cannot be held to respond in damages. To ascertain the duties and liabilities of the defendant company we must look to the nature of

the employment, and, except so far as it has limited its ordinary obligations by any special stipulation which may be held to be reasonable, be governed by the general and well-established principles of law pertaining to such employment.

It is now perfectly well settled by the great weight of judicial authority that although telegraph companies are engaged in what may appropriately be termed a public employment, and are therefore bound to transmit, for all persons, messages presented to them for that purpose, they are not common carriers in the strict sense of the term. To be sure, they are engaged in a business almost, if not quite, as important to the public as that of carriers. But while the analogy between the common carrier of goods and the common carrier of messages is very strong, nevertheless their responsibility differs in a manner corresponding to the difference in the nature of the services they perform. The common carrier of goods, in the absence of any special contract or regulation limiting its general liability, becomes an insurer of property entrusted to it for carriage; whereas, in the absence of any contract or regulation modifying the liability of telegraph companies, they do not insure absolutely the safe and accurate transmission of messages as against all contingencies, but they are bound to transmit them with care and diligence adequate to the business which they undertake, and for any failure in such care and diligence they become responsible. This appears to be the doctrine now settled by the courts, and is founded upon reason. The following decisions in this country are authority, and may properly be cited in this connection. *Bartlett v. W. U. Tel. Co.*, 62 Me. 220, 221; *Ayer v. Same*, 79 Me. 493; *Ellis v. Am. Tel. Co.*, 13 Allen, 232, which hold them to the use of due and reasonable care, and liable for the consequences of their negligence in the conduct of their business to those sustaining loss or damage thereby. *Breese v. U. S. Tel. Co.*, 48 N. Y. 141; *Leonard v. N. Y., Albany, &c., Tel. Co.*, 41 N. Y. 571; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 751; *Birney v.*

N. Y. & Wash. Tel. Co., 1 Daly, 547; *N. Y. & Wash. Tel. Co. v. Dryburg*, 35 Pa. St. 298; *Graham v. W. U. Tel. Co.*, 1 Colo. 230; *Sweatland v. Ill., &c., Tel. Co.*, 27 Iowa, 433; *W. U. Tel. Co. v. Carew*, 15 Mich. 525; *W. U. Tel. Co. v. Neill*, 57 Tex. 283; *Wash. & N. O. Tel. Co. v. Hobson*, 15 Grat. 122; *Pinckney v. Tel. Co.*, 19 S. C. 71; *Smithson v. U. S. Tel. Co.*, 29 Md. 167; *Little Rock, &c., Tel. Co. v. Davis*, 41 Ark. 79.

A more stringent rule, however, was at first suggested in two early cases. The earliest one in which the question of the liability of telegraph companies arose was that of *Mac Andrew v. Electric Tel. Co.*, 17 C. B. (84 E. C. L. 3), decided in England in 1855. This case, by implication, only can be said to be authority for holding them to the liability of insurers. It was soon followed in this country by the case of *Parks v. Alta California Tel. Co.*, 13 Cal. 422, decided in 1859, the only case to be found in which telegraph companies have been expressly held to be common carriers, and subject to the same severe rule of responsibility. With this exception, all the American courts which have expressed any decided opinion upon this question have concurred in the doctrine above stated.

The degree of care which these companies are bound to use is to be measured with reference to the kind of business in which they are engaged. As compared with many other kinds of business, the care required of them might be called "great care." While meaning really the same, it is variously stated by different courts in the decisions to which we have referred,—“due and reasonable care;” “ordinary care and vigilance;” “reasonable and proper care;” “reasonable degree of care and diligence;” “care and diligence adequate to the business which they undertake;” “with skill, with care, and with attention;” “a high degree of responsibility.” These are but the varied forms of expressing the requirement of what is known in law as ordinary care, as applied to an employment of this nature, an employment which is not that of an ordinary bailee. The public, as a general rule, have no choice in the selection of the com-

pany. They have none in the selection of its servants or agents. They have no control over the agencies or instrumentalities used in conducting the business of the company. The public must take the agencies which the companies furnish, and they have no supervision over its management or methods of performing the service which it holds itself out as willing and ready to perform. And while we do not hold that these companies are common carriers, and subject to the same severe rule of responsibility, we think that those who engage in the business of thus serving the public by transmitting messages should be held to a high degree of diligence, skill and care, and should be responsible for any negligence or unfaithfulness in the performance of their duties.

A telegraph company, which holds itself out to the public as ready to transmit all messages delivered to it, is bound to have suitable instruments and competent servants, and to see that the service is rendered with that degree of care and skill which the peculiar nature of the undertaking requires. We do not understand, however, that this duty would impose a liability upon the company for want of skill or knowledge not reasonably attainable in the art, nor for errors or imperfections which arise from causes not within its control, or which are not capable of being guarded against. *White v. W. U. Tel. Co.*, 14 Fed. Rep. 710; *Sweatland v. Ill. & Miss. Tel. Co.*, 27 Iowa, 433; *Leonard v. N. Y., &c., Tel. Co.*, 41 N. Y. 572; *Ellis v. American Tel. Co.*, 13 Allen, 233; *Bartlett v. W. U. Tel. Co.*, 62 Me. 221.

We think our own court has expressed the doctrine we are discussing in language so fitting that we may be justified in making the following extended quotation from the case last cited:

“To require a degree of care and skill commensurate with the importance of the trust reposed, is in accordance with the principles of law applicable to all undertakings of whatever kind, whether professional, mechanical, or that of the common laborer. There is no reason why the business of sending messages by telegraph should be made an

exception to the general rule. This requires skill as well as care. If the work is difficult, greater skill is required. It is often necessary to entrust to this mode of communication matters of great moment, and, therefore, the law requires great care. It is necessary to use instruments of a somewhat delicate nature and accurate adjustment, and, therefore, they must be so made as to be reasonably sufficient for the purpose. The company holding itself out to the public as ready and willing to transmit messages by this means, pledges to that public the use of instruments proper for the purpose, and that degree of skill and care adequate to accomplish the object proposed. In case of failure in any of these respects, the company would undoubtedly be liable for the damage resulting. This would not impose any liability for want of skill or knowledge not reasonably attainable in the present state of the art, nor for errors resulting from the peculiar and unknown condition of the atmosphere, or any agency from whatever source, which the degree of skill and care spoken of is insufficient to guard against or avoid."

Taking the facts as proved in the case now under consideration, and applying the principles of law to them, are the plaintiffs entitled to recover?

They make out a *prima facie* case when they show that the message which the company undertook to send was not delivered, and that damage has resulted. It is not necessary that they show affirmatively that the failure to deliver happened through any omission of duty by the company or its officers, or from some defect in the instrumentalities employed by the company. The failure to deliver being shown, the legal presumption is that it was caused by some one or other of these causes, or of all combined. It then becomes incumbent on the defendant, if it would relieve itself from the consequences of such presumption, to overcome that presumption by showing that in the attempted transmission and delivery of the message it exercised all proper care and diligence commensurate with the undertaking, and that the failure is not attributable to

any fault or negligence on its part, or that of any of its employés. *Bartlett v. W. U. Tel. Co.*, 62 Me. 221; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; *W. U. Tel. Co. v. Graham*, 1 Colo. 230; *Shear. & Red. on Neg.*, § 559; *W. U. Tel. Co. v. Wenger*, 55 Pa. St. 262.

The case last named was where a message sent by the plaintiff's line to New York was transmitted only to Philadelphia, and no reason was assigned for the failure to transmit the message to its destination. The court say: "No such reason as the law would recognize, and, indeed, no reason at all, was given for the failure to transmit the message to its destination. Thus was presented a clear case of gross negligence against the company, in performing its undertaking, and a consequent liability to the plaintiff for such damage as he had sustained in consequence thereof."

The case at bar is unlike that. While it is true that the message in this case was not transmitted to its destination, the defendant here has assumed the burden of proof, after the *prima facie* case of the plaintiffs and by evidence, which is uncontradicted, has shown that the failure was caused by agencies over which it had no control, and for which it was not responsible. The dispatch when received at the Chicago office during the night, was taken from the wire, and the relay copy was hung upon the Stock-Yards' hook, to be forwarded the following morning when the office at that place should open. This is all that could be done that night. By the terms of the company's stipulation or regulation to which the plaintiffs, by their signature thereto, either assented, or by which they must be held to be estopped (*Breese v. U. S. Tel. Co.*, 48 N. Y. 141, 142; *Grinnell v. W. U. Tel. Co.*, 113 Mass. 307), aside from the void condition of which we have spoken, the message was not to be delivered earlier than the morning of the next ensuing business day. An earlier transmission in this case was impossible. Immediately prior to the time for forwarding the message over the line communicating with the Stock Yards a fire suddenly broke out in the operating

room, and before anything could be rescued, the whole room was enveloped in flames, and this message destroyed.

The origin of the fire, as we have stated, and as the evidence shows, was due to atmospheric conditions and influences over which the defendant company had no control. There were no improvements known or anywhere in use which could guard against the possibility of such an occurrence. If the company ought to have foreseen that such an accident might happen, or if such an occurrence could reasonably have been anticipated, and it could have been guarded against, then the omission to provide against it might be held to be actionable negligence. But the facts, as they appear in the case, rebut any negligence on this ground. That it was likely to occur was only a possibility. The fire does not appear to have originated through any fault or negligence of the company or its employés, or through any imperfections in the chemicals, metals, machinery, or implements used by it, which, by any skill or knowledge reasonably attainable in the present state of telegraphy, could be guarded against.

The facts proved bring the case within the decisions to which we have referred in another part of this opinion, and upon those facts and the law it is the opinion of the court that the plaintiffs cannot prevail. *Judgment for defendant.*

PETERS, C. J., and WALTON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

NOTE.—This case is cited in *Gillis v. W. U. Tel. Co.*, *post.* *Bartlett v. W. U. Tel. Co.*, vol. 1, p. 45, is a Maine case upon the same general subject as this and the two preceding cases.

See INDEX to this and to previous volume, titles "Duty to Customers," "Limiting Liability."

The duty of telegraph companies as public carriers of messages by the use of the electric current has been much discussed by the courts. Reference to several early cases is made in a note at page 79 of volume 1 of this series. The following quotations are from the language of the courts in cases reported in said volume :

ARKANSAS.—"While telegraph companies are not insurers and do not guarantee the delivery of all messages with entire accuracy, and against all contingences, they do undertake for ordinary care and vigilance in the

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performance of their duties, and to answer for the neglect and omission of duty of their servants and agents."

Little Rock, &c., Tel. Co. v. Davis, p. 526.

CALIFORNIA.—"By statute, therefore, a telegraph company in this State is not a common carrier, and the degree of care and diligence exacted of such companies in the transmission and delivery of messages is great care and diligence."

Hart v. W. U. Tel. Co., p. 734.

GEORGIA.—WARNER, C. J.: "What law of this State authorizes the courts thereof to declare that a telegraph company, using its peculiar machinery for the transmission of messages from one point to another, is a common carrier, or a *quasi* common carrier, and liable as such for its neglect of duty in the particular business in which it is engaged? We know of none; but, on the contrary, the true nature and character of its liability would seem to be that of a bailee for hire."

BLECKLEY, J. (concurring): "I am inclined to the opinion that the business of telegraphing consists merely in receiving orders for work and labor and executing them. Strictly speaking, there is no bailment, and, therefore, no carriage of property."

JACKSON, J. (concurring): "I wish to say that I am inclined to think that the business of a telegraph company is very similiar to that of a common carrier, and approximates very nearly to that business."

W. U. Tel. Co. v. Fontaine, p. 229.

ILLINOIS.—"Strong reasons might be urged in favor of holding these companies to the severe liabilities of common carriers, but the current of authority at this time is not, as admitted by appellants, in that direction. Whilst their liability is held to be analogous to that of common carriers, who are insurers of the safe delivery of the articles intrusted to them, it is considered in view of the means employed by telegraph companies to transmit messages, and their liability to sudden accidents which cannot be foreseen and provided against, to hold them as insurers of the safe delivery of every message intrusted to them would be too rigid a rule. Cases so holding, hold, nevertheless, that they are liable for a failure to exercise the highest degree of diligence and skill in the performance of their duty."

Tyler v. W. U. Tel. Co., p. 14.

KENTUCKY.—"A few cases are to be found in which it has been held that telegraph companies are to be regarded as common carriers; but the later current of authority is not in this direction. It is, however, a public agent; it exercises a *quasi* public employment; carefulness and fidelity are essentials to its character as a public servant, and public policy forbids that it should abdicate as to the public by a contract with the individual."

Smith v. W. U. Tel. Co., p. 743.

MAINE.—"That the liabilities of a common carrier do not attach to business of this kind may now be considered as well settled. That messages of the highest importance are often sent requiring a proportionate degree of care, may be considered equally certain. To require a degree of care and skill commensurate with the importance of the trust reposed is in accordance with the principles of law applicable to all undertakings of whatever

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kind, whether professional, mechanical, or that of the common laborer. There is no reason why the business of sending messages by telegraph should be made an exception to the general rule. The company holding itself out to the public as ready and willing to transmit messages by this means, pledges to that public the use of instruments proper for the purpose, and that degree of skill and care adequate to accomplish the object proposed.

In case of failure in any of these respects, the company would undoubtedly be liable for the damage resulting."

Bartlett v. W. U. Tel. Co., p. 45.

MASSACHUSETTS.— "The liability of a telegraph company is quite unlike that of a common carrier. A common carrier has the exclusive possession and control of the goods to be carried, with peculiar opportunities for embezzlement or collusion with thieves; the identity of the goods received with those delivered cannot be mistaken; their value is capable of easy estimate, and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed accordingly; and his liability in damages is measured by the value of the goods. A telegraph company is intrusted with nothing but an order or message, which is not to be carried in the form in which it is received, but is to be transmitted or repeated by electricity, and is peculiarly liable to mistake; which cannot be the subject of embezzlement; which is of no intrinsic value; the importance of which cannot be estimated except by the sender, nor ordinarily disclosed by him without danger of defeating his own purposes; which may be wholly valueless, if not forwarded immediately; for the transmission of which there must be a simple rate of compensation; and the measure of damages for a failure to transmit or deliver which, has no relation to any value which can be put on the message itself."

Grinnell v. W. U. Tel. Co., p. 70.

NEW YORK.— "The defendant is not a common carrier, and, therefore, the peculiar liability of a common carrier does not exist in this case."

Schwarz v. A. & P. Tel. Co., p. 284.

OHIO.— "But that telegraph companies exercise a *quasi* public employment, with duties and obligations analogous to those of a common carrier, is a proposition clearly settled. The statute confers upon them power of eminent domain, which no one will contend could be conferred upon them, consistently with the Constitution, if they were engaged in a mere private employment or occupation by which the public interests were not affected."

"The rule in this State is well settled, that one exercising a public employment is liable for failing to bring to the service he undertakes that degree of skill and care which a careful and prudent man would under the circumstances employ."

Tel. Co. v. Griswold, p. 329.

OREGON.— "And although a telegrapher is not an insurer, and therefore not responsible for an error in a message consequent on causes beyond his control, he is, like a common carrier, a servant of the public by reason of his employment, and bound to the exercise of care and diligence adequate to the discharge of the duties thereof, and cannot by any notice, regula-

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tion or contract, limit or control his liability for the negligence of himself or servants."

Abraham v. W. U. Tel. Co., p. 728.

SOUTH CAROLINA.—“To apply the rule of common carriers to these companies, would, it seems to us, be extremely unjust, and to hold them absolutely liable as insurers would greatly impair this mode of correspondence, crippling, if not destroying, a most important and growing department of business.

Such we do not understand to be the law as settled in England, or in a majority of the American States. It is true there is a lack of uniformity in the decisions, and in many cases where the point has not been distinctly adjudged, will be found many loose and somewhat ill-defined expressions tending to the application of the stringent doctrine of common carriers, but the current of authority is decidedly opposed to this. 2 Thomp. Neg. 836, and the numerous cases cited in the note at that page. Cases from New York, Pennsylvania, Missouri, Maryland, Michigan, Kentucky and other States. We concur in the doctrine indicated on these cases.”

Pinckney v. W. U. Tel. Co., p. 516.

TEXAS.—“The great weight of authority, and which from the nature of the employment of telegraph companies seems founded upon reason, is that though in some essential particulars they partake of the character of common carriers, they are not strictly such, and should not be held to the same degree of strict responsibility.

“As our Legislature, however, has delegated to telegraph companies the power to exercise the right of eminent domain, and as their employment is *quasi* public, they should so far be governed by the law applicable to common carriers that the general duty devolves upon them to serve the public and act impartially and in good faith to all alike, and to send messages in the order received. But they are not, as is the general rule with common carriers, insurers, simply by reason of their occupation, but are held only to a reasonable degree of care and diligence in proportion to the degree of responsibility.”

W. U. Tel. Co. v. Neill, p. 852.

VIRGINIA.—“While it seems, from an examination of many decisions, that the weight of judicial opinion is that telegraph companies are not common carriers in the strict sense of the term, yet on account of the public nature of their employment, they have been held in many cases to a very similar degree of responsibility.”

W. U. Tel. Co. v. Reynolds, p. 487.

WISCONSIN.—“In the language of the court, in *Baldwin v. The United States Telegraph Co.*, 45 N. Y. 744-751, ‘while telegraph companies are not insurers, and do not guarantee the delivery of all messages with entire accuracy and against all contingencies, they do undertake for ordinary care and vigilance in the performance of their duties, and to answer for the neglect and omission of duty of their servants and agents;’ and this degree of liability the law imposes upon them, as well in the transmission and delivery of a night as of a day dispatch.”

Hibbard v. W. U. Tel. Co., p. 62.

McCord v. Telegraph Co.

THOMAS McCORD v. THE WESTERN UNION TELEGRAPH
COMPANY.

Minnesota Supreme Court, Sept. 4, 1888.

(89 Minn. 181.)

FORGED TELEGRAM.—LIABILITY OF TELEGRAPH COMPANY FOR ACTS OF
AGENT.—PROXIMATE CAUSE.

A telegraph company is liable to the receiver of a message forged by its agent, sent over its line, received by the addressee in the usual course of business and acted upon in good faith, for the damage sustained by him thereby.

The agent who forged and sent a telegram was also agent of the express company, by which money was sent pursuant to the telegram, and he intercepted the money and converted it to his own use. Held, that the transmission of the telegram was the proximate cause of the loss, and that the telegraph company was liable therefor, even though the express company might also have been liable.

Case of this series cited in opinion: *Bank of California v. W. U. Tel. Co.*, vol. 1, p. 239.

APPEAL from District Court, Ramsey county.

Action for damages. Appeal by defendant below.

I. V. D. Heard and Wager Swayne, Geo. H. Fearons and C. Walter Artz, for appellant.

Flandrau, Squires and Cutcheon, for respondent.

VANDEBURGH, J.: Dudley & Co., who resided at Grove City, Minn., were the agents of plaintiff for the purchase of wheat for him. He resided at Minneapolis, and was in the habit of forwarding money to them, to be used in making such purchases, in response to telegrams sent over the defendant's line, and delivered to him by it. On the 1st day of February, 1887, the defendant transmitted and delivered to plaintiff the following message, viz.:

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" GROVE CITY, Minn., February 1, 1887.

" *To T. M. McCord & Co.:* Send one thousand or fifteen hundred to-mor-
row. DUDLEY & Co."

The plaintiff in good faith acted upon this request, believing it to be genuine, and, in accordance with his custom, forwarded through the American Express Company the sum of \$1,500 in currency, properly addressed to Dudley & Co., at Grove City. It turned out, however, that this dispatch was not sent by Dudley & Co., or with their knowledge or authority; but it was in fact false and fraudulent, and was written and sent by the agent of the defendant at Grove City, whose business it was to receive and transmit messages at that place. He was also at the same time the agent of the American Express Company for the transaction of its business, and for a long time previous to the date mentioned had so acted as agent for both companies at Grove City, and was well informed of plaintiff's method of doing business with Dudley & Co. On the arrival of the package by express at Grove City, containing the sum named, it was intercepted and abstracted by the agent, who converted the same to his own use. The dispatch was delivered to the plaintiff, and the money forwarded in the usual course of business. These facts, as disclosed by the record, are sufficient, we think, to establish the defendant's liability in this action.

1. Considering the business relations existing between plaintiff and Dudley & Co., the dispatch was reasonably interpreted to mean a requisition for one thousand or fifteen hundred dollars.

2. As respects the receiver of the message, it is entirely immaterial upon what terms or consideration the telegraph company undertook to send the message. It is enough that the message was sent over the line, and received in due course by plaintiff, and acted on by him in good faith. The action is one sounding in tort, and based upon the claim that the defendant is liable for the fraud and misfeasance of its agent in transmitting a false message prepared by himself.

New York, etc., Tel. Co. v. Dryburg, 35 Pa. St. 298 (78 Am. Dec. 338); Gray Tel., § 75.

3. The principal contention of defendant is, however, that the corporation is not liable for the fraudulent and tortious act of the agent in sending the message, and that the maxim *respondeat superior* does not apply in such a case, because the agent in sending the dispatch was not acting for his master, but for himself, and about his own business, and was in fact the sender, and to be treated as having transcended his authority, and as acting outside of and not in the course of his employment, nor in furtherance of his master's business. But the rule which fastens a liability upon the master to third persons for the wrongful and unauthorized acts of his servant is not confined solely to that class of cases where the acts complained of are done in the course of the employment in furtherance of the master's business or interest, though there are many cases which fall within that rule. *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Fishkill Savings Inst. v. National Bank*, 80 N. Y. 162, 168; *Potulni v. Saunders*, 37 Minn. 517 (35 N. W. Rep. 379). Where the business with which the agent is intrusted involves a duty owed by the master to the public or third persons, if the agent, while so employed, by his own wrongful act occasions a violation of that duty, or an injury to the person interested in its faithful performance by or on behalf of the master, the master is liable for the breach of it, whether it be founded in contract or be a common-law duty growing out of the relations of the parties. 1 Shear. & R. Neg. (4th ed.), §§ 149, 150, 154; Tayl. Corp. (2nd ed.) § 145. And it is immaterial in such case that the wrongful act of the servant is in itself wilful, malicious, or fraudulent. Thus a carrier of passengers is bound to exercise due regard for their safety and welfare, and to protect them from insult. If the servants employed by such carrier in the course of such employment disregard these obligations, and maliciously and wilfully, and even in disregard of the express instructions of their employers, insult and maltreat passengers, under their care, the master is liable. *Stewart*

v. *Brooklyn & Crosstown R. Co.*, 90 N. Y. 588, 593. In *Booth v. Farmers, etc., Bank*, 50 N. Y. 396, an officer of a bank wrongfully discharged a judgment which had been recovered by the bank, after it had been assigned to the plaintiff. It was there claimed that the authority of the officer and the bank itself to satisfy the judgment had ceased, and that hence the bank was not bound by what its president did after such assignment. But the court held otherwise, evidently upon the same general principle, as respects the duty of the bank to the assignee, and laid down the general proposition equally applicable to the agent of the defendant in the case at bar, that the particular act of the agent or officer was wrongful and in violation of his duty, yet it was within the general scope of his powers, and as to innocent third parties dealing with the bank, who had sustained damages occasioned by such act, the corporation was responsible.

And the liability of the corporation in such cases is not affected by the fact that the particular act which the agent has assumed to do is one which the corporation itself could not rightfully or lawfully do. In *Farmers, etc., Bank v Butchers' & Drovers' Bank*, 16 N. Y. 125, 133 (69 Am. Dec. 678), a case frequently cited with approval, the teller of a bank was with its consent in the habit of certifying checks for customers, but he had no authority to certify, in the absence of funds, which would be a false representation; yet it was held, where he had duly certified a check though the drawer had no funds, that the bank was liable, on the ground that, as between the bank which had employed the teller, and held him out as authorized to certify checks (which involved a representation by one whose duty it was to ascertain and know the facts), and an innocent purchaser of the check so certified, the bank ought to be the loser. *Gould v. Town of Sterling*, 23 N. Y. 439, 463; *Bank of New York v. Bank of Ohio*, 29 N. Y. 619, 632. See, also, *Titus v. President, etc., Turnpike Road*, 61 N. Y. 237; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, 64; *Lane v. Cotton*, 12 Mod. 472, 490. The defendant selected

its agent, placed him in charge of its business at the station in question, and authorized him to send messages over its line. Persons receiving dispatches in the usual course of business, when there is nothing to excite suspicion, are entitled to rely upon the presumption that the agents intrusted with the performance of the business of the company have faithfully and honestly discharged the duty owed by it to its patrons, and that they would not knowingly send a false or forged message, and it would ordinarily be an unreasonable and impracticable rule to require the receiver of a dispatch to investigate the question of the integrity and fidelity of the defendant's agents in the performance of their duties, before acting. Whether the agent is unfaithful to his trust, or violates his duty to, or disobeys the instructions of the company, its patrons may have no means of knowing. If the corporation fails in the performance of its duty through the neglect or fraud of the agent whom it has delegated to perform it, the master is responsible. It was the business of the agent to send dispatches of a similiar character, and such acts were within the scope of his employment, and the plaintiff could not know the circumstances that made the particular act wrongful and unauthorized. As to him, therefore, it must be deemed the act of the corporation. *Bank of Cal. v. Western Union Tel. Co.*, 52 Cal. 280; *Booth v. Farmers, etc., Bank, supra*.

4. The defendant also insists that it is not liable for the money forwarded in response to the dispatch because it was embezzled by Swanson as agent of the express company. It is unnecessary to consider whether an action for the amount might not have been maintained against that company as well as against the defendant or the agent himself. The position of trust in which the defendant had placed him enabled him, through the use of the company's wires in the ordinary course of his agency, to induce the plaintiff to place the money within his reach. It is immaterial what avenue was chosen. Had it been forwarded and intercepted by a confederate, the result would have been

the same. The proximate cause of plaintiff's loss was the sending of the forged dispatch. The actual conversion of the money was only the culmination of a successful fraud. The acts of Swanson as agent of the defendant and of the express company were the execution of the different parts of one entire plan or scheme. That his subsequent acts aided and concurred in producing the result aimed at, did not make the forged dispatch any the less operative as the procuring or proximate cause of plaintiff's loss. *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469, 475; *Martin v. North Star Iron Works*, 31 Minn. 407-410 (18 N. W. Rep. 109).

Order affirmed, and case remanded for further proceedings.

NOTE.—See INDEX to this and to previous volume, title “Forged and Fraudulent Telegrams.” Also note, vol. 1, p. 246.

Minnesota cases on telegraph companies' liabilities, in vol. 1 are: *Beaupre v. P. & A. Tel. Co.*, p. 141; *Cole v. W. U. Tel. Co.*, p. 707.

THE WESTERN UNION TELEGRAPH COMPANY V. JOHN M. ALLEN.

Mississippi Supreme Court, June 3, 1889.

(66 Miss. 549.)

FAILURE TO DELIVER TELEGRAM.—ACTION FOR PENALTY.—RIGHT OF ADDRESSEE.

Under a statute giving a penalty to the person injured by the default of a telegraph company in the transmission or delivery of a message, *held*, that the penalty enured to the benefit of the addressee, although he had not paid for the transmission nor had he suffered any pecuniary loss.

APPEAL by defendant from judgment of Circuit Court, Lee county, in favor of the plaintiff, for seventy-five dollars,
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the statutory penalty for three undelivered telegrams addressed to him.

Sykes & Richardson, for appellant.

Allen, Robbins & Stribling, for appellee.

COOPER, J., delivered the opinion of the court :

By an act approved March 18, 1886 (Acts 1886, page 91), it is provided :

“ That if any telegraph company shall neglect, fail or refuse to transmit and deliver, within a reasonable time, without good and sufficient excuse, any message delivered to it for such purpose, the person injured shall receive (recover) the sum of twenty-five dollars in addition to such other damages as are now allowed by law.”

The appellee was the sendee of three messages of a social character, which were not delivered within a reasonable time, without excuse, and for such neglect to deliver, he instituted this action to recover the statutory penalty, claiming no other damages.

There is an agreed statement of facts on which the case was tried, by which it appears that each of the several messages was delivered to the company for transmission and the charges paid by the sender ; that the messages were of no pecuniary value to appellee ; and that he has sustained no pecuniary loss by the failure to deliver them.

Appellant contends that the statute only gives the penalty it imposes to the party “ injured ” by the neglect, and that it is given “ in addition to such other damages as are now allowed by law,” and that a sendee of a message has no right of action against a telegraph company for neglect to deliver.

The important question is thus presented to the court whether any duty is assumed by a telegraph company to the person to whom a message is addressed, who has paid nothing for its transmission, for which an action will lie in his favor.

It is well settled in England that under such circumstances no action can be maintained, even though the company negligently delivers a different message than that it received, by reason of which the sendee, acting on the message delivered to him, sustains pecuniary loss.

In America the contrary rule is announced, where injury results from the delivery of a message other than that transmitted, but the courts are not agreed upon the principle upon which the action rests. In his work, *Communications by Telegraph*, Mr. Gray classifies the decisions made by the American courts on this subject, and declares that no satisfactory ground has been found on which, in analogy to legal principles, the liability of the company can be rested. As stated by him, the liability has been put upon some one of the following grounds :

1. That, as a telegraph company is in the exercise of a public, as distinguished from a private, calling, it is the common agent of both parties to a telegraph message, or a public agent liable to any one injured by its negligence.

2. That the person addressed is the beneficiary of a contract.

3. That the message is the property of the person addressed, the position of such person being analogous to that of a consignee of goods.

4. That the sendee is the principal of the telegraph company in those cases where he originally employed the company. Gray on *Communications by Telegraph*, 117 to 122.

While it may be difficult to reply to the criticisms of the grounds upon which the American decisions rest, it must be regarded as settled by an almost unbroken current, that the telegraph company is under responsibility to the sendee, at least in those cases in which injury results from the delivery of an altered message. Mr. Bigelow suggests as a satisfactory ground for holding the company liable under such circumstances the fact that communication by telegraph is usually resorted to only in matters of importance, by reason of which the company ought to infer that its transmission is a matter of consequence, and that a "mistake in

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its transmission will be likely to produce damage to the receiver, by causing him to do that which otherwise he would not do. Knowing, then, the probably evil consequences of transmitting an erroneous message they owe a duty to the receiver of refraining from such act; and if (by negligence) they violate this duty, they must, on plain legal principles, be liable for the damage produced." *Leading Cases on Torts*, 602.

It will be noted that this proposed solution of the difficulty begins with the assumption that the telegraph company, by accepting the message, comes under the obligation of a "duty" to the sendee.

If it be true, as suggested, that the telegraph company, by accepting the message for transmission, comes under a duty to the addressee, it does not seem to be difficult to find equal liability for delay in the transmission, or for failing to deliver, as exists for its delivery of an altered message. Delay or neglect to deliver is as much a breach of duty, if a duty exists, as is the delivery of an altered message. The reason of the existence of such companies is not that by them messages may be more accurately transmitted than by the ordinary means of communication, but it is because that they may be more rapidly transmitted; and it cannot be seriously contended that a telegraph company might be liable for an erroneous delivery on the ground that the nature of its business indicated to it the importance of delivering the exact message sent, and at the same time its responsibility be denied for damages caused by delay in delivering the message, because it is not advised by the nature of its business of the importance of speedy delivery.

The English courts end all controversies by declaring that the obligation of the company is to the sender alone; that it owes no duty to the sendee, and, because it does not, is not liable either for delay or for the delivery of an altered message. The key to the question is whether a duty exists to the sendee. If it does, and there is a breach of that duty, the consequence is and must be responsibility for the injury that flows from the breach. It is admitted that the

almost universal doctrine of the American courts is that a telegraph company is liable for damages resulting from the delivery of a changed message. It cannot be denied that no such liability would result from a negligent mistake of a private person. The conclusion is inevitable that a different rule is applied in the one case than in the other; it is equally certain that the reason of the difference is, that telegraph companies perform public duties, *i. e.*, are devoted to public service and the interest of the public can only be conserved by holding them liable under circumstances where no liability would attach to the default of private persons. Telegraph companies are essential agents in the transactions of commerce. They have found and occupied a field peculiar to themselves, which neither their interest nor the welfare of the world can permit to be again vacant. Their rights, duties, and responsibilities are neither that of common carriers, of agents, bailees or servants. They are independent transmitters of intelligence, acting for themselves in and about the business of others. In the very nature of things they are relied on equally by those who transmit and those who receive messages committed to their hands. The injury that follows their neglect may be at one or the other end of the line, or at both at once, and of this they are informed by the very nature of the business in which they are engaged. It may be safely said that there are thousands of persons sendees of messages who are daily subjected to danger of loss by reason of delay or error in the transmission of telegraph messages, to one who, in the early history of the English law, relied upon the services of the common carrier. The courts then, as the courts now, conscious of the needs of the public, expanded the principles of the law, fitted them to the exigencies of the occasion, and imposed a degree of liability unknown to other contract relations, but required for the safety and protection of the public. The rule that a husband was entitled to curtesy in the equitable estate of the wife was denied application to the case where the wife claimed dower in the equitable estate of the husband for the reason that the

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public had acted upon a contrary belief; and yet it is impossible to give a logical reason why it should not have been applied in the one instance as well as the other. The system of laws peculiar to partnerships was created by the courts because of a necessity for its existence. There is probably no principle on which the courts have agreed, or which is consistent with the body of the laws from which the liability of municipal corporations for injury to a traveler resulting from defective ways can logically be drawn. Instances might be multiplied in which courts, pressed by the public necessities, and in the absence of legislative remedy, have afforded relief. So it is with reference to the class of cases now under consideration. The courts, impressed with the justice of the claim of him who has sustained injury to compensation from the delinquent who has caused it, have on one or another analogy afforded relief. It may be admitted that technical objections can be made to the application of each and every principle in analogy to which they act. To those decisions, in which the telegraph company is treated as bailee, it may be objected that a bailee is one who receives property, and that intelligence is not property subject to bailment. To those which deduce the liability from the principles of agency, that the company is agent only for him who employs it. To those which hold that the sendee may sue upon the contract as one made for his benefit, that one not a party to an executory contract has no right of action on it. To those which declare that the telegraph company is in the exercise of a public employment, and is responsible for any breach of duty, that it owes no duty to the public as individuals except to contract with each on his demand, and that there is no contract save with the sender of the message. It yet remains true that the courts on some one or the other of these grounds have steadily adhered to the rule of liability. The fundamental principle is that there is some breach of duty, and whether this duty is logically deduced from any well-recognized rules applicable to other relations becomes immaterial when there is a consensus of

judicial opinion as to its existence. We are content to take our place in the line of American authorities, and, without assenting fully to either of the processes of reasoning by which the result has been reached, to accept as settled the rule of liability because the telegraph company is a public agent, and as such, from the peculiar character of its business, is connected with the sendee of the message so far as to impose upon it a duty to deliver the intelligence intrusted to it for him. Whether this be property, or simply an intangible thing of value to him, it is that which the company is under duty to communicate according to its course of business, and delay in the delivery is as much a breach of duty as the delivery of an altered message, and, in either event, recovery may be had by the sendee.

In the case under consideration, though no pecuniary injury was sustained, there was a violation of the legal right of appellees, and a consequent right to recover damages, though nominal, and to this is added the penalty given by the statute.

The judgment is affirmed.

NOTE.—See INDEX to this and to previous volume, title “Receiver or Addressee.” See note, vol. 1, p. 39, note to *W. U. Tel. Co. v. Longwill*, post.

WILLIAM H. BLISS, Respondent, v. THE BALTIMORE & OHIO
TELEGRAPH COMPANY, Appellant.

St. Louis Court of Appeals, March 27, 1888.

(30 Mo. App. 103.)

DELAY OF TELEGRAM.—DAMAGES.

In case of negligent delay to transmit and deliver a dispatch, the sender is entitled to recover of the telegraph company his actual damages for loss of time and expenses.

Cases of this series cited in opinion: *Sprague v. W. U. Tel. Co.*, vol. 1, p. 204; *Thompson v. W. U. Tel. Co.*, vol. 1, p. 772.

Bliss v. Telegraph Co.

APPEAL from the St. Louis Circuit Court, Hon. SHEPARD BARCLAY, Judge. The facts are stated in the opinion.

Pollard & Werner, for the appellant.

Hough, Overall & Judson, for the respondent.

PEERS, J., delivered the opinion of the court :

This is an action for damages for failure to deliver a message sent by respondent from St. Louis to Chicago. The suit was instituted before a justice of the peace, where judgment was rendered for the plaintiff. The defendant appealed to the Circuit Court, where the cause was tried by the court sitting as a jury, and resulted in a judgment for the plaintiff, for \$24.33, after deducting defendant's counter-claim of \$9.08.

In due time a motion for a new trial was filed, and being overruled by the court, the defendant appeals to this court, asking a reversal of the judgment of the trial court on the ground of excessive damages.

The facts are as follows: Respondent, on the twenty-second day of April, 1885, wrote on one of the blanks of the appellant company, and delivered to its authorized agent the following message :

“ST. LOUIS, April 22, 1885.

“To Charles Fairchild :

“Care C., B. & Q. Ry. Co., Chicago, Ill's.

“Meet you Saturday morning, Grand Pacific. Think consultation desirable. Answer.

“WM. H. BLISS.”

On which blank were printed the usual conditions and regulations on the part of the company, for the transmitting of which respondent paid the usual fee. This message was not delivered to Fairchild, to whom it was addressed, until the twenty-fourth of April, although he had made inquiry at the C., B. & Q. offices for messages on both the twenty-third and twenty-fourth of April. After Fairchild had

made his arrangements to start to Boston, and after this respondent had left St. Louis for Chicago, the message was delivered. When respondent reached Chicago he found Fairchild gone and his trip a useless one. On his return to St. Louis he sued the appellant for his actual expenses and lost time, which the Circuit Court found to aggregate \$33.41, from which was deducted \$9.08, which respondent admitted that he owed the appellant.

The appellant makes the following concessions in the briefs filed in this court:

“As the question of negligence in the delivery of the message, being one of fact, must be considered as settled against appellant by the finding of the Circuit Court, no question will be raised upon it here, however erroneous we may consider it; and the only points to which we shall refer are, the message and amount of the damages.”

The fact of negligence on the part of the appellant is, therefore, conceded, and there is nothing in the bill of exceptions to show that respondent's account for expenses and time lost, owing to the non-delivery of the message, was excessive or even unreasonable. Indeed the record shows the testimony for respondent to stand uncontroverted on the question of amount of damages, and the judgment of the court to be for a less amount than the testimony on that point proved the respondent to be entitled to.

The only question remaining is, did the court correctly declare the law as to the measure of damages. The first instruction given by the court was as follows:

“The court declares the law to be that the delivery of the message in question, which the defendant company was bound to use ordinary care in endeavoring to make, according to the address given in the message, was an immediate delivery, or as nearly immediate as practicable, upon the day of its date, in view of the recognized purposes of telegraphic communication, and if the court find from the evidence that defendant was guilty of want of ordinary care in failing so to use ordinary care to so deliver the message in question, the plaintiff is entitled to recover such actual

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damages for loss of time and traveling expenses, not exceeding the sum of sixty-five dollars, less the admitted counterclaim of nine dollars and eight cents, as the court finds he has sustained in consequence of such failure to deliver."

This instruction clearly lays down the law as found in the case of *Sprague v. Telegraph Company*, 6 Daly, 200, which both appellant and respondent cite as authority. The rule, as above laid down in the instruction under consideration, clearly and correctly declares the law, and we know of no well-considered authority to the contrary.

The damages asked for and recovered by respondent are in no sense speculative, but are the actual damages which the evidence shows he sustained. *Telegraph Co. v. Wenger*, 55 Pa. 262; *Squire v. Telegraph Co.*, 98 Mass. 232; *Thompson v. Telegraph Co.*, 64 Wis. 531.

It follows that the judgment must be affirmed. All concur.

NOTE.—See INDEX to this and to previous volume, title "Damages."
See note at vol 1, p. 58.
See note to next case.

ELIZABATH THOMPSON, Executrix of Waddy Thompson,
deceased, Respondent, v. THE WESTERN UNION TELE-
GRAPH COMPANY, Appellant.

Kansas City Court of Appeals, October 29, 1888.

(32 Mo. App. 191.)

SUNDAY DISPATCH — PENALTY.

The penalty prescribed by law in Missouri in case of false information given by a servant of a telegraph company as to the time within which a message can be sent and delivered, cannot be recovered by a person who presents an ordinary business dispatch for transmission on Sunday, it being illegal to transmit such a message on that day.

Case of this series cited in opinion: *Rogers v. W. U. Tel. Co.*, vol. 1, p. 386.

APPEAL from Pettis Circuit Court — Hon. RICHARD FIELD, Judge.

The case is stated in the opinion.

Charles E. Yeater, for the appellant.

Bothwell & Jaynes, for the respondent.

HALL, J.: This action was instituted by Waddy Thompson in his lifetime to recover the statutory penalty of one hundred dollars for the defendant giving to him false information in relation to the time in which a dispatch, which he made application to send, could be sent. Waddy Thompson recovered in the Circuit Court, and the defendant appealed to this court; after the appeal he died, and the action was here revived in the name of his executrix.

The petition alleges: "That on Sunday, the twenty-first day of February, 1886, at eight o'clock in the evening, at the office and station of defendant, in Kansas City, Missouri, * * * plaintiff made application * * * to send a dispatch * * * to one J. H. Bothwell, at Sedalia, Missouri, * * * and plaintiff * * * asked defendant's agent and servant whether or not defendant could and would send and transmit and deliver a dispatch from plaintiff, at said Kansas City, to said J. H. Bothwell, at Sedalia, and deliver said dispatch immediately to said J. H. Bothwell the same evening at Sedalia. Plaintiff then and there stating that * * * it would do no good to send the dispatch if it could not be transmitted that day." It also appeared from the petition that the telegram was of an ordinary business character, and that the object of the sender of the dispatch would have been accomplished by the delivery of it in Sedalia at any time after twelve o'clock Sunday night, in time to have enabled Bothwell to have taken the train from Sedalia to Kansas City at four o'clock on Monday morning.

The false information alleged by the petition to have been given by the defendant's agent to the applicant was that

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the dispatch could be sent at once, whereas, in fact, the office at Sedalia was not a night-office on Sunday, that is, that it was not open on Sunday night.

The penalty to recover which this suit was instituted is imposed by the following statute (R. S., sec. 885) :

" In all cases where application is made to any telephone or telegraph company or the operator, agent, or servant thereof, to send a dispatch, it shall be the duty of such operator, agent, clerk, or servant who may receive dispatches at that station, plainly to inform the applicant, and if required by him, to write upon the dispatch that the line is not in working order, or that the dispatches already on hand for transmission will occupy the time, so that the dispatch offered can not be transmitted within the time required if the facts be so ; and for omitting so to do, or for intentionally giving false information to the applicant in relation to the time within which the dispatch offered may be sent, such operator, agent, clerk or servant, and the company by which he is employed, shall incur a like penalty as in section eight hundred and eighty-three."

The penalty imposed by the section mentioned is one of one hundred dollars "to be recovered with costs of suit, by civil action, for the benefit of the person or persons or company sending or desiring to send such dispatch."

It appears so clearly from the language of the statute, that no argument is needed to prove it, that the penalty is imposed for the benefit of one applying to send a dispatch, and that, therefore, the penalty cannot be incurred except where application is made by some one to send a dispatch.

How can an application be said to be made, within the meaning of the statute, when the application is to send a dispatch which the applicant has no legal right to send, or the telegraph company a legal right to transmit? If the company is by positive law prohibited from transmitting the dispatch, can the one applying to send it be included within the protection of the statute? We think clearly not. And, in our opinion, it matters not whether the prohibition of the law against the transmission of the dispatch is on account of its form, or the time within which the applicant asks to have the dispatch sent. But, if there be any such difference, it certainly cannot be in favor of the

matter of time, since the false information punished by the statute is false information in relation to the time within which a dispatch can be sent, and the statute must be held to mean such time as that within which a dispatch may be legally sent.

We therefore hold that if we apply to send a dispatch, at a time the telegraph company is prohibited by law from transmitting it, the company, by giving false information that the dispatch can be sent at that time, does not incur the penalty imposed by the statute. How can the applicant be injured by false information as to the physical ability of the company to transmit the dispatch, if the company had no power under the law to do so? Of the law the applicant is bound to know, and hence cannot be ignorant of the want of the company's legal power to transmit the dispatch.

The defendant was prohibited by section 1578, Revised Statutes, from transmitting the dispatch in suit on Sunday, unless the transmission of it was under the statute a work of necessity (*Rogers v. Tel. Co.*, 78 Ind. 169); and it was not a work of necessity since the dispatch was on ordinary business.

The applicant asked that the dispatch be sent on Sunday, the information was in relation to sending the dispatch on Sunday, and hence the company incurred no penalty. It matters not that the applicant might have asked for the transmission of the dispatch early on Monday morning, since he did not do so.

Under the petition, therefore, the plaintiff was not entitled to recover; and the judgment is reversed and the petition dismissed. All concur.

NOTE.—See INDEX to this and to prior volume, title "Sunday Contract."

This case is cited in *Cutts v. W. U. Tel. Co.*, *post*.

Missouri cases upon liability of telegraph companies, in vol. 1, are: *Massengale v. W. U. Tel. Co.*, p. 724; *Markel v. W. U. Tel. Co.*, p. 862, note.

THE WESTERN UNION TELEGRAPH COMPANY V. LONGWILL.

New Mexico Supreme Court, March 21, 1889.

(21 Pac. R. 839.)

DELAY OF TELEGRAM.—RIGHT OF ADDRESSEE.—TIME LIMIT.—DAMAGES.

In case of the negligent delay of a telegram the addressee may recover from the company damages for the injury sustained by him.

In such an action, the plaintiff is not bound by a stipulation in the blank upon which the sender presented the message for transmission, limiting the time in which claims for damages must be presented.

The plaintiff being a physician and the message being a call for a professional visit to a distant place, which would have occupied several days, and the call having been countermanded because of the delay, the measure of damages would be the difference between the lost fee and what he earned during the time the visit would have required.

Cases of this series cited in opinion : *W. U. Tel. Co. v. Fontaine*, vol. 1, p. 229 ; *W. U. Tel. Co. v. Buchanan*, vol. 1, p. 1 ; *W. U. Tel. Co. v. Fenton*, vol. 1, p. 198 ; *Candee v. W. U. Tel. Co.*, vol. 1, p. 99 ; *Grinnell v. W. U. Tel. Co.*, vol. 1, p. 70 ; *Passmore v. W. U. Tel. Co.*, vol. 1, p. 168 ; *W. U. Tel. Co. v. Blanchard*, vol. 1, p. 404 ; *Tyler v. W. U. Tel. Co.*, vol. 1, p. 14 ; *W. U. Tel. Co. v. Cohen*, vol. 1, p. 670 ; *W. U. Tel. Co. v. Brown*, vol. 1, p. 481 ; *W. U. Tel. Co. v. Cobbs*, ante, p. 474 ; *W. U. Tel. Co. v. McKibben*, ante, p. 525.

ACTION for damages. Appeal by defendant below from judgment of District Court, Santa Fe county. Facts stated in opinion.

Catron, Knaebel & Clancey, for plaintiff in error.

Wm. Breeden and W. B. Sloan, for defendant in error.

HENDERSON, J.: This is an action of trespass on the case, brought by the defendant in error against the Western Union Telegraph Company, to recover damages on account of alleged negligence in not delivering a telegram sent to

him from Springer, N. M., on the evening of the 14th of January, 1884. Plaintiff resided at Santa Fe, where the message was addressed, and was a physician and surgeon. The purpose of the telegram was to summon him from Santa Fe to Springer to attend a person suffering from a gunshot wound. The message was not delivered until after 9 o'clock in the forenoon of the 15th. The telegram requested the presence of the plaintiff below that night. Two trains—one at 9 o'clock that night and one at 9 o'clock the next morning—had departed after the sending and receipt of the message at Santa Fe, and before the delivery to plaintiff. The telegraph office was in an adjoining building to the drug store, where he kept his office, and was usually found, within 150 or 200 yards of his residence. He was a well-known resident of the city, and at home at the time the message should have been delivered. The declaration is in the usual form, except that it does not state with much fullness of detail the special circumstances of his legal injury. The defendant pleaded the general issue, and a special plea setting up the fact that the message was transmitted upon certain conditions, which are set out in the message put in evidence. One condition was that the company would not be held liable for unrepeatd messages. The other was that unless the person injured should within 60 days present a claim in writing, demanding damages from the company, it would be exonerated from all liability. The message was unrepeatd. No demand in writing, claiming damages, was filed with the company within 60 days.

Plaintiff testified that he would have made the visit to Springer, but was prevented by the negligence of the company in not delivering the message until after train time, and that during the day of the 15th, he was advised by another telegram from the same parties not to come, as it was too late. The injured man died on the 15th. He also testified that he would have charged \$500 for the trip and professional services, and that such sum would have been a reasonable charge. His testimony was supported by another physician as to the reasonableness of the charge and

the value of the proposed services. It also appeared in evidence that it would have required four or five days, including traveling time, to have completed the trip and treatment of the patient. During this time plaintiff admits that he was regularly engaged in the practice of his profession at Santa Fe, and had several patients in charge, but he says he would have made more by going to Springer, as that would have been a consultation fee.

The sender of the telegram were solvent. The damages claimed in the declaration were \$1,000. The judgment recovered was for \$500. At the conclusion of the evidence the defendant moved the court to instruct the jury to find for the defendant, and suggested reasons therefor. The court refused, and an exception was taken and saved. Exceptions were taken to the refusal of the court to charge the jury as requested in instructions numbered 3 and 4 moved by defendant, and for giving an instruction by the court of its own motion. Fourteen errors are assigned. The principal propositions discussed, however, may be ranged under the *first*, to the effect that the declaration and record do not disclose any legal cause of action against the defendant below; *third*, that the verdict is not supported by the evidence of the amount of damage sustained by the plaintiff, if any; *fourth*, that plaintiff did not within 60 days present his claim in writing for the damages sued for; *seventh*, that the court erred in instructing the jury of its own motion as appears in the record.

Upon the first assignment, we think it sufficient to say that there appears to have been no demurrer, either general or special, to the declaration. Nor was there any objection made to the introduction of evidence, because there was no averment in the declaration under which evidence of plaintiff's damages could be received. While the statement in the declaration is in very general terms, it will be deemed good after verdict and judgment, when left unchallenged by the ordinary modes of reaching a formal insufficiency or uncertainty. The proof offered supplied the want of accuracy of allegation, and was admitted without objection. The

appellant company is a corporation engaged in the business of transmitting news for hire. It owes a duty to the public. Want of proper care and diligence in the performance of this duty to the defendant in error is the gravamen of his action. The defendant company sustained, strictly speaking, no contractual relations with the plaintiff, but it owed a duty to him by reason of its public character to perform its obligations not only to the sender of the message, with whom it did have contractual relations, but to the plaintiff as well. The injury sustained by the plaintiff was caused directly and immediately by the negligence of the defendant's agents and servants in not delivering the message within a reasonable time. It is urged on behalf of the defendant in error that no action can or ought to be maintained by the plaintiff for the reason that he was only the receiver, and not the sender, of the message, and that the action would only lie, if at all, by the sender of the message, on the contract entered into and embodied in the message or blank forming part of it. This is the rule in England. *Playford v. Telegraph Co.*, L. R., 4 Q. B. 706; *Dickson v. Telegraph Co.*, L. R., 2 C. P. Div. 62; *Feaver v. Telegraph Co.*, 23 U. C. C. P. 150. Mr. Sutherland, in his work on Damages, states the rule to be different in this country, and uses the following language: "In this country a different doctrine prevails. The company's employment is of a public character, and it owes the duty of care and good faith to both the sender and receiver." And, further continuing the subject, referring to the case of *Telegraph Co. v. Dryburg*, 35 Pa. St. 298, says: "It was ruled that, though not insurers of the safe delivery of what is intrusted to them, their obligations, like those of common carriers, sprang from the public nature of their employment, and the contract under which the particular duty is assumed." 3 Suth. Dam. 314. That this is the American doctrine needs no further citation of authorities.

It is contended on behalf of the plaintiff in error that the condition annexed to the message imparted notice to the plaintiff below that the company would not be liable for any dam-

ages unless a claim in writing should be filed with the company within 60 days from the date of its receipt by him. That, it is urged, is not a contract for entire immunity from legal liability on account of the negligence or want of care of defendant's servants and employes, but it is a reasonable regulation, made necessary by the nature and character of its business, and does not violate any principle of public policy. "Telegraph companies may make reasonable regulations for the safe and proper conduct of their business, and have power to contract with the sender of the message, so as to relieve themselves from liability for inadvertencies, but not for gross negligence, misconduct, or bad faith." 3 Suth. Dam. 296; *Telegraph Co. v. Carew*, 15 Mich. 525; *Telegraph Co. v. Gildersleeve*, 29 Md. 248; *Telegraph Co. v. Graham*, 1 Colo. 230; *Telegraph Co. v. Fontaine*, 58 Ga. 433; *True v. Telegraph Co.*, 60 Me. 9; *Telegraph Co. v. Buchanan*, 35 Ind. 429; *Telegraph Co. v. Fenton*, 52 Ind. 1; *Candee v. Telegraph Co.*, 34 Wis. 471; *Sweatland v. Telegraph Co.*, 27 Iowa, 433; *Breese v. Telegraph Co.*, 48 N. Y. 132; *Grinnell v. Telegraph Co.*, 113 Mass. 299; *Passmore v. Telegraph Co.*, 78 Pa. St. 238. The instruction given by the court of its own motion, which is made a ground of error, is in line with the doctrine announced in the foregoing cases. Counsel for defendant, however, insists that the charge is not applicable to the defense based on the 60-day condition constituting part of the contract of transmission and delivery of the message, and was misleading and erroneous. If the sender of a telegraphic message cannot enter into a contract with a telegraph company so as to enable the company to relieve itself from all liability, not only from inadvertencies, but for gross negligence, misconduct, or bad faith, we do not see why the same rule, founded upon public policy, would not preclude the public carrier from contracting for a conditional liability on account of the negligence. This is not a regulation in any degree essential to the proper discharge of its business. Whether a liability had been incurred or not is the business of the company to know. Telegraph companies are bound

to employ competent and faithful agents, who will perform their duties with a degree of care and diligence proportioned to their delicacy and importance.

In *Railroad Co. v. Lockwood*, 17 Wall. 357, Mr. Justice BRADLEY, after an exhaustive discussion of the question of the power of the common carrier to stipulate for exemption from liability on account of negligence, or want of proper care on the part of the carrier or its agents, sums up the conclusions of the court as follows: “(1) That a common carrier cannot stipulate for exemption from responsibility, when such exemption is not just or reasonable in the eye of the law. (2) That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.” While the weight of authority is perhaps against classing a telegraph company as a common carrier, still the same reason that makes void the contracts of common carriers for exemption from responsibility for the negligence of the carrier or its employés, makes void the same kind of contracts of telegraph companies. *Telegraph Co. v. Blanchard*, 68 Ga. 299; *Tyler v. Telegraph Co.*, 60 Ill. 421; *Telegraph Co. v. Cohen*, 73 Ga. 522; *Telegraph Co. v. Dryburg*, 35 Pa. St. 298; *Telegraph Co. v. Brown*, 58 Tex. 170. While telegraph companies are not charged with all the duties and responsibilities of common carriers, they cannot contract for restriction of liability for injuries occasioned by culpable negligence or gross carelessness, or wilful misconduct of their employés. *White v. Telegraph Co.*, 14 Fed. Rep. 710.

The courts are divided in opinion as to whether a stipulation between the sender of a message and the company, providing that a claim for damages shall be presented within a day named, or within a reasonable time, can be entered into and upheld as a contract. Instead of being a reasonable business regulation, we think the condition named and annexed to the message was an effort on the part of the company to restrict its legal liability to 60 days. It would introduce into the local jurisprudence of every

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State, territory, or country in which it is sued a species of private statute of limitation, or non-claim. It would avoid the policy of the State or territory in the matter of the time in which actions both in tort and contract should be brought. But aside from this we think there can be no sound reason for holding that in cases where no contract for total immunity from legal responsibility can be made, none can be made for a conditional release or discharge, because public policy alike denies the power to contract on the subject in either instance. In support of this view, in addition to the cases herein referred to, we cite the following; *Johnston v. Telegraph Co.*, 33 Fed. Rep. 362; *Telegraph Co. v. Cobbs*, 47 Ark. 344 (1 S. W. Rep. 558); *Telegraph Co. v. McKibben*, 14 N. E. Rep. 894. In the last cited case the Supreme Court of Indiana held the condition to be void as against the plaintiff, the receiver of the message. The defendant in error was the receiver of the message here, and sues in tort for the injury sustained by him. He sustained an injury caused by the confessed negligence of the defendant's agents in not delivering the message in a reasonable time. Whether the duty to transmit and deliver sprang out of the contract with the sender in whole or in part, the company nevertheless accepted the duty, and did not discharge its obligations. We think there was no error in giving the instruction complained of by the court on its own motion. It correctly stated the law on this subject, although it did not in terms declare that the condition annexed was void. That was the effect of the charge.

It is further contended that the damages recovered are excessive. In *Griffin v. Colver*, 16 N. Y. 489, Justice SELDEN, defining the measure of damages in this class of cases, said: "The party injured is entitled to recover all damages, including gains prevented as well as losses sustained." And this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, they must be such as might naturally be expected to follow its violation; and they

must be certain, both in their nature and in respect to the cause from which they proceed. The gain prevented here was a reasonable fee or award to the plaintiff, Longwill, for his professional visit to Springer. This prevented gain was such as might naturally be expected to follow the failure to deliver the message in due season. Reasonable compensation to the plaintiff was fairly within the contemplation of the parties when the message was sent. It is proven that the persons sending the telegram were solvent, and the amount to be paid, although not agreed upon, was certain to the extent of reasonable compensation. That amount, as shown by the record, was \$500. The cause from which the injury proceeded is equally certain. The particular facts upon which it is insisted that the recovery is shown to be too large are stated in the testimony of the plaintiff. He testified that during the time he would have been absent from his home and away from his usual line of practice in Santa Fe, he was engaged in practice, and had cases under his charge. He says he would have made more by going than by attending to his patients in Santa Fe. The damages claimed by plaintiff on account of his injury in being deprived of going to see the patient at Springer was only \$500. No other claim was made in the evidence, hence the finding of the jury was upon this item alone. The measure of plaintiff's damages was correctly stated in the charge. There was no evidence of the amount earned by plaintiff during the four or five days he says it would have taken him to make the visit, attending to his patient, and return. It was not the fault of the jury that the amount earned was not taken from the amount he would have made except for the negligence of the defendant. The difference between what he would have made, had he gone, and what he made at home during the time, was the measure of his damages. The evidence, we think, clearly shows that he received something. This fact was developed on cross-examination, and either party might have shown the amount so received. Plaintiff was content to show that he might have made \$500. The defendant was content to show that plaintiff had other

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professional employments during the period required to make the trip to Springer; and that such employments were less remunerative than the prevented trip. As the burden was on the plaintiff to show his actual loss and injury, and there being nothing in the facts proven to justify the assessment of a higher grade than actual or compensatory damages, we are of the opinion that the duty of showing what his loss was, fell upon him. It follows that the amount recovered was in excess of the plaintiff's own estimate of his damages when computed by deducting his gains at home for the period complained of. As there will be little gained by sending the case back for retrial, the plaintiff, if he so elects, may enter a *remittitur* here of \$100, and pay the costs of this court, and the judgment below will be affirmed; otherwise the judgment of the court below will be reversed, and the case remanded for a new trial.

LONG, C. J., and BRINKER, J., concur.

NOTE.—See Index to this and to previous volume, titles “Receiver or Addressee,” “Limiting Time,” “Damages.”

See notes vol. 1, pp. 39, 58.

The following Canadian cases relate to the rights of the addressee of a telegram:

Feaver v. Montreal Telegraph Co., 23 Upper Canada C. P. 150 (1873).

The addressee has no action against the telegraph company, because of want of priority.

Upon further facts, held in the same case, 24 Up. Can. C. P. 258 (1874):

A contract made between the agent and the telegraph company allows the principal, through the receiver of the message, to sue for damages.

Bell v. Dominion Tel. Co., 3 Legal News, 405.

“A telegraph company is responsible to the party to whom the message is directed, for negligence in failing to deliver a telegram; and the fact that the sender did not repeat the message does not affect the rights of the person to whom the message is addressed.” (The foregoing is quoted from the Quebec Digest.)

Watson v. Montreal Tel. Co., 5 Legal News, 87.

“A telegraph company is responsible to the receiver of a telegram for error in the transmission of an unrepeatd message caused by the negligence of its employee, in spite of conditions printed in the blank.” (Quebec Digest.)

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In *Dickson v. Reuter's Tel. Co.*, 37 L. T. 870 (Court of Appeal of England), a telegraph company by mistake delivered to the plaintiffs at Valparaiso a telegram purporting to be from its Liverpool house. It was not intended for the plaintiffs, and was acted upon by them to their injury. Held, that there being no fraud, the plaintiff could not recover for want of priority.

ALBERT G. WOLFSKEHL, Respondent, v. THE WESTERN
UNION TELEGRAPH COMPANY, Appellant.

N. Y. Supreme Court, Second Department, December, 1887.

(46 Hun, 542.)

DUTY OF TELEGRAPH COMPANY TO THE PUBLIC.—RIGHT OF ADDRESSEE.

While a telegraph company is not chargeable with the full liability of common carriers, it is bound by so much of the carrier law as requires care and diligence adequate to the obligations it assumes.

Its service is undertaken for the benefit of both sender and receiver, and either party sustaining damage by its negligence has a right of action against it.

ACTION for damages for error in transmission of telegram. Appeal from interlocutory judgment overruling demurrer, the ground of demurrer being that the complaint did not state facts sufficient to constitute a cause of action.

The complaint alleged that the plaintiff was a musician, and was at the time in question under an engagement which was to last at least a year, at an annual salary; that the telegram in question was the reply to one previously sent by him, asking to be engaged as a musician.

That the telegram as presented by the sender to the company for transmission to him was as follows:

“July 24, 1886.

“To Mr. Alfred Wolfskehl, 387 E. 19th street, N. Y.: Have decided not to engage you at present.

MYRTLE KINGSLAND.”

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That the defendant agreed to transmit the message, and the toll therefor was paid by said Myrtle Kingsland ; and the dispatch delivered to him read as follows :

“ROCKAWAY BEACH, N. Y., July 24, 1886.

“To M. Alfred Wolfskehl, 337 19th street, N. Y.: Have decided to engage you at present. MYRTLE KINGSLAND.”

That relying on the message as delivered to him he threw up his position and other engagements, and suffered loss of time and money to the amount of \$2,000.

Rush Taggart, for the appellant.

Horace Graves, for the respondent.

DYKMAN, J.: This is an action by the receiver of a telegram against the defendant, based upon the negligence of the company in the transmission of the message. The complaint charges the negligent omission of the word “not” from the message and its delivery to the plaintiff in that changed condition, and his action upon the incorrect message by which he sustained damages. The defendant demurred to the complaint, and the trial court overruled the demurrer and the defendant has appealed from the judgment. It is the insistence of the defendant in this action, that it owed no duty to the plaintiff in the transmission of the message to him, because it sustained towards him no contractual relation, and that only such persons as sustain a relation to the company by contract can have a remedy against it. The question presented is of very great importance to the public and the telegraph companies, and neither the elementary writers nor the adjudicated cases furnish us much assistance in its solution. They are quite inharmonious and unsatisfactory and throw but little light upon the question.

While telegraph companies have not been made chargeable with the absolute liability of common carriers, yet they are engaged in a public employment for hire, and

bound to exercise care and diligence, adequate to the obligations they assume, to transmit messages safely and correctly and avoid errors and mistakes, and in this sense they are common carriers, and so, much of the law of common carriers becomes applicable to telegraph companies. They undertake to transmit communications from one to another, and they hold themselves out to the world as possessing the skill and ability to perform that service with accuracy and dispatch. They thus undertake the performance of a peculiar service for a stipulated reward paid either by the sender or the receiver, but the service and duty is undertaken for the benefit of both, and either party sustaining damage from the negligent performance of such duty should have a remedy by action against the company for their recovery.

It seems consonant with the settled principles of the law to hold the defendant responsible to the plaintiff in this action.

The judgment should be affirmed, with costs.

BARNARD, P. J., and PRATT, J., concurred.

Order overruling demurrer to complaint and judgment affirmed, with costs.

NOTE.—See INDEX to this and to previous volume, titles “Duty to Customers,” “Receiver or Addressee.”

See notes, vol. 1, pp. 39, 79 ; also note to *Kiley v. W. U. Tel. Co.*, *post.*, as to the same subjects.

For other N. Y. cases upon liabilities of telegraph companies, see note to *Mowrey v. W. U. Tel. Co.*, *post.*

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JOHN B. KILEY, Appellant, v. THE WESTERN UNION
TELEGRAPH COMPANY, Respondent.

N. Y. Court of Appeals, April 10, 1888.

(109 N. Y. 231.)

FAILURE TO DELIVER TELEGRAM.—LIMITING LIABILITY.—UNREPEATED
MESSAGE.—MUTILATED BLANK.

The usual stipulation with respect to unrepeated messages found in telegraph blanks is reasonable and valid, and binding upon persons using them.

A message having been transmitted, but failing to reach its destination, the burden is upon the sender to show that the failure was due to the wilful misconduct or gross negligence of the telegraph company.

The blank as offered in evidence being mutilated and part of the printed conditions gone, the trial judge left it to the jury to say whether or not it was in that condition when the message written upon it was presented for transmission. Held, error: First, because there was no evidence warranting such submission; second, because even if it were in such condition, it would not avail the sender.

Cases of this series cited in opinion: *Redpath v. W. U. Tel. Co.*, vol. 1, p. 40; *Grinnell v. W. U. Tel. Co.*, vol. 1, p. 70; *Clement v. W. U. Tel. Co.*, vol. 1, p. 671; *Schwartz v. A. & P. Tel. Co.*, vol. 1, p. 284; *Young v. W. U. Tel. Co.*, vol. 1, p. 187.

APPEAL from order of the General Term of the Supreme Court, fifth judicial department, which reversed a judgment for plaintiff, entered upon a verdict, and granted a new trial.

The plaintiff, who was a speculator in oil, residing at Olean, delivered to the agent of the company, at its office in that place, for transmission to his brokers in Bradford, Pa., the following telegram:

“Buy the twenty-five in to-morrow morning at best;”

and paid the charge for transmission.

The message was an order to buy 25,000 barrels of oil,

and the operator so understood it. It was transmitted, but never reached its destination, whereby plaintiff suffered loss, which he sought to recover in this action.

Further facts appear in the opinion.

J. H. Waring, for appellant.

Wager Swayne, for respondent.

EARL, J.: The telegram was written on one of the ordinary blanks of the company. Immediately above the telegram were the words:

“Send the following message, subject to the above terms, which are hereby agreed to ;”

and below the telegram, in plain letters, were the following words:

“Read the notice and agreement at the top.”

The blank with the telegram written thereon, when introduced in evidence, was partly mutilated, a portion thereof, the upper left-hand corner, having been torn off. When complete, the blank contained this language:

“All messages taken by this company are subject to the following terms:

“To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same.

The defendant relies upon this stipulation as a defense to any recovery in this action.

That a telegraph company has the right to exact such a stipulation from its customers is the settled law in this and most of the other States of the Union and in England. *MacAndrew v. Electric Tel. Co.*, 33 Eng. L. and Eq. 180;

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Westren Union Tel. Co. v. Carew, 15 Mich. 525; *Ellis v. Am. Tel. Co.*, 13 Allen, 226; *Redpath v. Western Union Tel. Co.*, 112 Mass. 71; *Grinnell v. Western Union Tel. Co.*, 113 id. 299; *Clement v. Western Union Tel. Co.*, 137 id. 463; *Schwartz v. Atlantic & Pacific Tel. Co.*, 18 Hun, 157; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; *Breese v. United States Tel. Co.*, 48 id. 132; *Kirkland v. Dinsmore*, 62 id. 171; *Young v. Western Union Tel. Co.*, 65 id. 163. The authorities hold that telegraph companies are not under the obligations of common carriers; that they do not insure the absolute and accurate transmission of messages delivered to them; that they have the right to make reasonable regulations for the transaction of their business, and to protect themselves against liabilities which they would otherwise incur through the carelessness of their numerous agents and the mistakes and defaults incident to the transaction of their peculiar business.

The stipulation printed in the blank used in this case has frequently been under consideration in the courts and has always, in this State and generally elsewhere, been upheld as reasonable.

The plaintiff must be held to have assented to this stipulation. He was familiar with the defendant's blanks, having used them extensively for several years, and he had frequently read the words at the bottom of them, "read the notice and agreement at the top." Therefore, although he may not have known what the precise terms of the stipulations contained in the blank were, yet he knew that some stipulations were therein contained, and he must be held by the use of the blank and its delivery to the defendant to have assented to them.

The evidence brings this case within the terms of the stipulation. It is not the case of a message delivered to the operator and not sent by him from his office. This message was sent, and it may be inferred from the evidence that it went so far as Buffalo, at least; and all that appears further is that it never reached its destination. Why it did not reach there remains unexplained. It was not shown that

the failure was due to the wilful misconduct of the defendant, or to its gross negligence. If the plaintiff had requested to have the message repeated back to him, the failure would have been detected and the loss averted. The case is, therefore, brought within the letter and purpose of the stipulation.

But the trial judge held that if the blank upon which the message was written was torn and mutilated as it appeared when introduced in evidence, then the plaintiff was not bound by the stipulation and was entitled to recover, and he submitted to the jury the question as to the mutilation and they returned a special verdict that "it was torn as it now is when it was delivered by the plaintiff."

We are of opinion that the alleged mutilation of the blank is not available to the plaintiff in answer to the protection claimed by the defendant under the agreement, for three reasons: (1) We think there was no evidence which authorized the finding by the jury that the blank was mutilated at the time it was delivered to the defendant. The plaintiff testified that he went to the defendant's office and took up one of the blanks he found there and wrote his message upon it, and that he could not say whether the blank was torn at that time or not, and there is no evidence whatever that it was then torn. There is every presumption that it was in perfect condition at that time, and no presumption that a blank at one time perfect had then become imperfect. These blanks were carefully prepared by the defendant and kept for use in its offices by its customers, and it is not to be supposed that they would keep mutilated blanks on hand, or that a customer would use a mutilated blank. The manager of the defendant's office at Olean swore that he saw the message several times soon after it was delivered to the defendant's operator, and that it was then, according to his best recollection, perfect and unmutilated, and that he afterwards saw it in Buffalo, and then for the first time discovered that a portion of it had been torn off. This is all the evidence on that subject, and we think it is wholly insufficient to show that it was torn at the time it was

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delivered to the defendant. (2) Assuming that it was then torn, yet, when plaintiff wrote the message upon it, he must be supposed to have intended to be bound by the agreement mentioned therein. He knew that the blanks, when complete, contained certain agreements, and by using this blank and delivering it to the company, although torn at the time, he must be held to be bound by the agreements contained in a perfect blank. There was no intent to be bound by less, and the mutilation was not intended for the purpose of altering, changing or destroying the agreements. (3) Enough remained upon the blank, as mutilated, to show the agreement. It contained the following words: "The sender of a message should order it repeated; that is, telegraphed back. For this one-half the regular rate is charged in addition." "It is agreed between the sender, company, that said company shall not be liable for mistakes or delays in the transmission of any unrepeated message, whether happening by negligence of its servants or otherwise." If the language was not full and clear, the plaintiff was put upon inquiry and could have learned the full force of the stipulation by referring to a perfect blank. There was enough to show that the defendant was not to be responsible for an unrepeated message.

We are, therefore, of opinion that the plaintiff was bound by the stipulation contained in the blank, and that it furnished a defense to any recovery, except the amount paid for the transmission of the message, and thus it becomes unimportant to examine other grounds of defense brought to our attention.

The order of the General Term should be affirmed and judgment absolute rendered against the plaintiff, with costs.

All concur, except RUGER, Ch. J., not voting, and DANFORTH J., dissenting.

Order affirmed and judgment accordingly.

NOTE.—This case is cited in *Bennett v. W. U. Tel. Co.*, and *Gillis v. W. U. Tel. Co.*, in this volume.

See INDEX to this and to previous volume, title "Limiting Liability."

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For other New York cases, see note to *Mowry v. W. U. Tel. Co.*, *post*.

The validity of the stipulations customarily printed in their message blanks by telegraph companies, commonly known as the "night" or "half-rate" and "unrepeated message" conditions, has naturally been the subject of many decisions.

Many of the earlier cases upon the subject are mentioned in notes at pp. 44 and 99 of vol. 1 of this series.

The following compilation of decisions and quotations from opinions in said volume, arranged by States, may be useful :

ARKANSAS.—(*U. S. Circuit Court*). The stipulation in a half-rate message blank made the exemption complete, in case of errors or delays "happening from any cause." The court say :

"With knowledge of the fact that it was open to him to send the message at full rates, and secure accuracy in its transmission by having it repeated, the plaintiff elected to send it at half-rates, with full knowledge of the printed conditions on the blank on which the message was written. He must, therefore, be held to have agreed to these conditions; and he is bound thereby to the extent to which the conditions are valid and obligatory.

"It is sufficient to say that the weight of authority and the ablest and best reasoned cases establish the doctrine that the conditions contained in the blank, on which the plaintiff wrote his message and to which he assented, are reasonable and valid to the extent of protecting the telegraph company from damages for any error or mistake occurring in the transmission of the message, unless it is shown affirmatively that such error or mistake was the result of gross negligence or fraud on the part of the company."

Jones v. W. U. Tel. Co., p. 561.

CALIFORNIA.—Unrepeated message stipulation held to be binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated, for any cause except wilful misconduct or gross negligence on the part of the company.

Hart v. W. U. Tel. Co., p. 734.

GEORGIA.—Held that the half-rate message stipulation is invalid so far as it purports to exempt from liability for gross negligence.

W. U. Tel. Co. v. Fontaine, p. 229.

"It is insisted, however, by way of defense, that as the plaintiffs made no request or payment to have the message sent "repeated," and as, under the evidence and rules of the company, absolute accuracy in the transmission of messages can only be secured by "repeating" them, and plaintiffs were notified by the printed rules of this necessity, hence defendants are not liable, since they did not repeat the message. We can only say, that any rule or regulation of the company which seeks to relieve it from performing its duty belonging to the employment with integrity, skill and diligence, contravenes public policy as well as the law, and under it the party at fault cannot seek refuge. If it becomes

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necessary for the company in transmitting messages with integrity, skill and diligence, to secure accuracy, to have said messages repeated, then the law devolves upon them that duty, to meet its requirements."

W. U. Tel. Co. v. Blanchard, p. 404.

"It is wholly immaterial what condition it puts upon its printed heading of messages, so far as its liability for negligence is concerned. It is bound to discharge its duty to the public with skill and diligence, and to be accurate in the discharge of such duty, even if to repeat the message be necessary to insure accuracy."

W. U. Tel. Co. v. Shotter, p. 587.

ILLINOIS.—Unrepeated message stipulation held to be "unjust, unconscionable, without consideration, and utterly void."

Tyler v. W. U. Tel. Co., p. 14.

Respecting the stipulation in night-message blanks, the court say: "The rule or contract, whichever it may be, claimed to be now in question, covers all errors or delays from any cause, and it must be regarded so far as it proposes to relieve the corporation from responsibility for the negligence or misconduct of its own employes, as unreasonable and unjust, alike hurtful to private rights and against public policy, and consequently void."

W. U. Tel. Co. v. Harris, p. 839.

INDIANA.—Stipulation concerning repetition of messages held void, the court saying: "The gist of the action, as we have already seen, was the negligence of the company in failing to deliver the dispatch. The object, as we suppose, of repeating a message is to prevent mistakes in the transmission. How the repetition of a message would conduce to its prompt delivery we do not see. But, aside from the unreasonableness of a contract by which the prompt delivery of a message is made to depend upon its repetition at an additional expense, the defendant could not contract against liability for its own negligence."

W. U. Tel. Co. v. Fenton, p. 198.

After referring to several earlier cases, the court add: "While these authorities establish the proposition that telegraph companies may, within certain limits, establish rules and regulations which, in cases not depending on any statute, may govern the manner of sending messages, and the prices to be paid for messages, repeated messages, and insured messages, they also establish the proposition that such companies cannot make such rules and regulations as will protect them from liability for damages resulting from their own gross negligence, or the gross negligence of their agents and servants."

W. U. Tel. Co. v. Buchanan, p. 1.

IOWA.—"While the printed regulation in respect to the repetition of messages, in order to avoid mistakes, is a reasonable one, and will exempt the defendant from liability for mistakes occurring in the transmission of messages, which are occasioned by uncontrollable causes, such as atmospheric electricity, yet it will be liable, notwithstanding

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this regulation, for the want of ordinary and reasonable care in the transmission or *delivery* of messages sent over its lines. Notwithstanding this regulation or special agreement, it is still the duty of the defendant to employ skilful operators, use proper instruments, and through its employes, to exercise ordinary and reasonable care in the transmission and delivery of messages."

Manville v. W. U. Tel. Co., p. 92.

KENTUCKY.—"They undertake to exercise a public employment, which, in many respects, is analogous to that of a common carrier, and they must, therefore, bring to it that degree of skill and care which a prudent man would, under the circumstances, exercise in his own affairs; and any stipulation by which they undertake to relieve themselves from this duty, or to restrict their liability for its non-use, is forbidden by the demands of a sound public policy. To hold otherwise would arm them with a very dangerous power, and leave the public comparatively remediless."

Smith v. W. U. Tel. Co., p. 743.

MAINE.—Concerning a half-rate message blank, the stipulation under consideration exempting the company from liability for loss or injury "from whatever cause occurring," the court say: "We find, then, the provision under consideration equally invalid, whether as a regulation of the company or as the foundation of a special contract between the parties."

Bartlett v. W. U. Tel. Co., p. 45.

MASSACHUSETTS.—There being no evidence of fraud or gross negligence, the court held that the stipulation as to repeating messages was valid and effectual: "It seems to us that one who elects to save the small sum charged for a more extended liability cannot reasonably claim the benefit of it in a business where careful operators are so liable to make mistakes; and that this principle applies to every stage of dealing with the message."

Redpath v. W. U. Tel. Co., p. 40.

"The liability of a telegraph company may be limited by reasonable stipulations expressed in its contracts with the senders of messages; and, according to the weight of authority, a regulation that the liability of the company for any mistake or delay in the transmission or delivery of a message or for not delivering the same, shall not extend beyond the sum received for sending it, unless the sender orders the message to be repeated by sending it back to the office which first receives it, and pays half the regular rate additional, is a reasonable precaution to be taken by the company, and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated, for any cause except wilful misconduct or gross negligence on the part of the company."

Grinnell v. W. U. Tel. Co., p. 70.

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NEBRASKA.—There being “no pretense of gross negligence or wilful misconduct,” unrepeatd message stipulation held reasonable and valid.

Becker v. W. U. Tel. Co., p. 337.

NEW YORK.—“Nor is it necessary to say whether or not the defendant would be exempted from liability in case of “gross negligence or wilful misconduct;” for the only admission in the case is simply of negligence. The case, then, seems to be this: The company having a system of receiving and repeating messages by which it can, as it supposes, insure accuracy, and having a certain fixed rate for ordinary messages, is willing to send messages during the night, at half the ordinary rate (and, of course, without repetition), provided that, if the message is not received, the only liability of the company shall be to return the money. The plaintiff knew of these terms and accepted them. They are perfectly reasonable, and he should be bound by them.”

Schwarz v. A. & P. Tel. Co., p. 384.

OHIO.—“The rule in this State is well settled that one exercising a public employment is liable for failure to bring to the service he undertakes that degree of skill and care which a careful and prudent man would under the circumstances employ; and that any stipulation or regulation by which he undertakes to relieve himself from the duty to exercise such skill and care in the performance of the service, is contrary to public policy, and consequently illegal and void. In our opinion, telegraph companies fall within the operation of this rule; and that in failing to exercise such care and skill in the transmission and delivery of messages, they become liable for the resulting consequences, notwithstanding their stipulation to the contrary.”

Telegraph Co. v. Griswold, p. 339.

PENNSYLVANIA.—*Held*, that while “by no device can a body corporate avoid liability for fraud, for wilful wrong, or for the gross negligence which, if it does not intend to occasion injury, is reckless of consequences, and transcends the bounds of right with full knowledge that mischief may ensue,” still the ordinary stipulation as to repeating messages is valid.

Passmore v. W. U. Tel. Co., p. 168.

SOUTH CAROLINA.—The message was written on a half-rate blank, and the court held that although the language “from whatever cause occurring” was used, it was not to be construed so as to exempt the company in case of want of good faith; nor, on the other hand, would all cases of want of due care and skill be excluded from the exemption.

That opportunity being given to send messages by day, the company might lawfully refuse to transmit by night at all; or might transmit subject to special and reasonable regulations; and that the night-rate blank stipulation is reasonable.

Aikin v. W. U. Tel. Co., p. 121.

TEXAS.—Stipulation in night-message blank, exempting the company from liability for errors, delays or non-delivery “happening from any

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cause other than the acts of its corporate officers," *held* valid ; although the rule "that exemption from liability cannot be claimed for misconduct, fraud, or want of due care, is a cardinal doctrine of the common law, which has become deeply rooted into our own jurisprudence, and the wisdom of which has received the sanction of ages."

W. U. Tel. Co. v. Neill, p. 352 ; followed in *Womack v. W. U. Tel. Co.*, p. 454.

VIRGINIA.— "In the message blanks now commonly used, the conditions are printed upon the face of the paper in such a manner as to make them a part of the contract for transmission. This the company may do, provided the conditions are reasonable, as they are entitled to make all reasonable rules for the conduct of their affairs. These conditions must not only be reasonable, but they must be reasonably construed ; and a company will not be held able thus to make a contract against all liabilities, nor indeed against any liability imposed by the law upon them, nor relieve themselves from liability for the improper or negligent conduct of its servants."

W. U. Tel. Co. v. Reynolds p. 487.

WISCONSIN.— Concerning the stipulation in half-rate message blanks, exempting from liability, &c., "from whatever cause occurring," the court say: "The regulations were intended to secure the company against liability for the injurious consequences flowing from its own negligence and omissions, and from those of its agents and operators, in and about the performance of its contract entered into with the sender of the message." And were for that reason void, as against public policy ; also that they were without consideration and therefore void.

Candee v. W. U. Tel. Co., p. 99.

That the same form of stipulation, "adopted for the purpose of protecting the company against the consequences of the negligence or fraud of its agents, was an unreasonable condition, and was void as against sound public policy."

Hibbard v. W. U. Tel. Co., p. 62.

After citing the Candee and Hibbard cases : "We are quite satisfied with the decisions of this court above cited, and with the reasons given to sustain them, and we believe they are in accord with the weight of authority in other courts."

Thompson v. W. U. Tel. Co., p. 772.

**JAMES F. MILLIKEN, Appellant, v. THE WESTERN UNION
TELEGRAPH COMPANY, Respondent.**

N. Y. Court of Appeals, October 2, 1888.

(110 N. Y. 403.)

FAILURE TO DELIVER TELEGRAM.—RIGHT OF ADDRESSEE.—CONTRACT.

A complaint in an action against a telegraph company by the addressee of the telegram, contained, among others, the following allegations:

1. That the message was delivered to an ocean telegraph company at Paris, for transmission to New York, by the agent and upon the business of the addressee; and was never delivered to him; whereby loss was sustained.

2. That in the usual course of transmission it was received by the defendant, to be delivered to the plaintiff, but was never so delivered.

3. That the addressee called at the office of the defendant in New York, left his name and address (the telegram being in cipher, including the name of the addressee) and the agent of the defendant promised to deliver the telegram at said address when it should arrive, for which service the plaintiff offered to pay in advance, but payment was refused.

Held, that the complaint stated a good cause of action: (1) Upon the original contract with the agent of the addressee, even though the agency was not disclosed; and (2) upon the promise made to the addressee by the agent of the defendant in New York, which was supported by sufficient consideration, the addressee's tender of payment being for that purpose equivalent to payment, and even without that, the promise to deliver at the addressee's request implying a corresponding promise to pay.

Case of this series cited in opinion: *Wadsworth v. W. U. Tel. Co.*, *post*.

APPEAL from an order of the General Term of the Superior Court of New York city, affirming a judgment entered upon an order sustaining a demurrer to the complaint.

The following allegations appear in the complaint:

“III. That the principal business of defendant is to receive and transmit messages by telegraph over certain lines of wire running through the State of New York, and

into and through certain States and counties contiguous thereto, and to deliver the same, and to receive, transmit and deliver messages from abroad transmitted by submarine telegraph cables in connection with its lines of wire, and proper facilities operated by it for that purpose; and the confidence which the public is invited to and does repose in the care with which defendant conducts its said business is a source of large profit and gain to said defendant.

IV. And the said defendant held out and represented to the world, and to this plaintiff, that it would conduct its said business with reasonable care, diligence and dispatch, and that it would transmit, receive and deliver telegraphic and cable messages in a diligent, competent and correct manner with all convenient speed.

V. And plaintiff, relying upon said inducements and representations, entered into a contract with said defendant as hereinafter set forth.

VI. That plaintiff, on the 15th day of December, 1883, was applied to by a person who then desired to purchase from plaintiff a certain French play or dramatic composition entitled "Pot Bouille," owned by parties in the city of Paris, in the republic of France, and then being produced and exhibited in that city, and said applicant was then willing to pay plaintiff for said play the sum of \$3,000, but plaintiff was, at the time said application was made to him, ignorant of the facts as to whether he could purchase said play and the price he would be required to pay therefor; and, in order to ascertain said facts, plaintiff did, on said 15th day of December, 1883, send a cable message to Thomas Linn, plaintiff's agent in Paris, which said message was as follows, to wit: "What is the lowest price at which you can buy 'Pot Bouille?'" And said Linn received said message promptly and forwarded a reply to plaintiff addressed "Mentor, New York," which said reply plaintiff subsequently learned was received by defendant, and was in defendant's possession on the 17th day of December, 1883.

The plaintiff called at defendant's office on said 17th day of December, 1883, and inquired if defendant had received

a message addressed "Mentor, New York," and plaintiff was informed by defendant that it had not received such message; but said defendant then represented and stated to plaintiff that any message sent by cable from Paris to New York would be received by and through defendant in New York; but said defendant did not then, nor at any time thereafter, deliver said message to plaintiff, although plaintiff alleges, upon information and belief, that said message, directed as aforesaid, was then in the possession and custody of defendant.

Plaintiff further says that, on said 17th day of December, 1883, he requested defendant to register the name and address of plaintiff in order that said message might be promptly delivered to plaintiff, and defendant then and there, pursuant to its custom and in the regular course of its business, did register the name and address of plaintiff in a book kept by defendant for such purpose as follows, to wit: "Mentor, New York, James F. Milliken, No. 19 West Twenty-fourth street, New York city;" and plaintiff then informed defendant that he was expecting a message from Paris, addressed "Mentor, New York," and that he believed said message had been sent and should be in the possession and custody of defendant; and that said message was of great importance to plaintiff, and involved a transaction with regard to the sale of a play by plaintiff, and said transaction involved a large sum of money, and that plaintiff could do nothing with regard to it until he had received said message; and defendant then and there promised and agreed to and with the plaintiff that defendant would send such message without delay to plaintiff, at No. 19 West Twenty-fourth street, in said city of New York, if said message had been received, or should be received, by defendant; and defendant held out and represented to plaintiff, as hereinbefore set forth, that defendant would deliver said message to plaintiff safely, promptly, and with diligence and dispatch; and plaintiff, relying upon said representations and inducements, and reposing confidence in the care with which defendant conducted its said business

as aforesaid, did then and there contract and agree with defendant for the delivery of said message by defendant to plaintiff, and said defendant undertook and agreed, to and with this plaintiff, to deliver said message to plaintiff at No. 19 West Twenty-fourth street, in the city of New York, safely, promptly, and with diligence and dispatch, and plaintiff then offered to pay and reward said defendant in advance for said service and for registering plaintiff's name and address, but said defendant then declined to receive or accept pay or reward.

VII. That defendant received said message and reply, addressed "Mentor, New York," prior to the 19th day of December, 1883, as plaintiff is informed and believes, but said defendant, not regarding its said promise and undertaking, and well knowing the importance of said message, did not take due care to deliver said message to plaintiff as agreed, although thereafter frequently solicited and requested to do so by plaintiff, nor at any time afterwards, but, on the contrary, the defendant so negligently and carelessly conducted itself with respect to said message and the delivery thereof, that, by and through the mere carelessness, negligence and improper conduct of the defendant, its servants and employés, said message was never delivered to plaintiff, and is still in the possession and custody of defendant; and by reason of the premises in that behalf, and in consequence of the negligence of defendant as aforesaid, and not through any negligence or fault of this plaintiff, plaintiff lost the sale of said play, and suffered thereby loss and damage in a large sum of money, to wit, in the sum of \$1,400; and plaintiff alleges that he has since ascertained the fact to be that said message contained information that plaintiff could purchase and secure said play at a price not to exceed 8,000 francs; and plaintiff alleges that if defendant had delivered said message to plaintiff, as agreed, plaintiff would have sold said play for \$3,000 and would have realized thereby a profit of not less than \$1,400.

Wherefore plaintiff demands judgment, etc.

William L. Snyder, for appellant.

Wager Swayne and *David Keane*, for respondent.

RUGER, Ch. J.: The questions involved in this appeal are raised by a demurrer to the complaint, alleging that it does not state facts sufficient to constitute a cause of action.

Both the Special and General Terms sustained the demurrer, and ordered judgment for defendant. We are of the opinion, however, that the complaint does state a cause of action.

It must be assumed, at the outset, that the facts stated therein, as well as such as may, by reasonable and fair intendment, be implied from the allegations made, are true. It is not sufficient, to sustain a demurrer, to show that the facts are imperfectly or informally averred, or that the pleading lacks definiteness and precision, or that the material facts are argumentatively stated. *Lorillard v. Clyde*, 86 N. Y. 384; *Marie v. Garrison*, 83 id. 14. If, from the facts stated, it appears that the defendant incurred a liability to the plaintiff, whether arising upon contract, or from an omission to perform some legal duty or obligation resting upon it, the complaint should be sustained, whether the plaintiff has set forth the legal inferences which may be implied from the facts stated or not. *White v. Madison*, 26 N. Y. 117. The present system of pleading does not require that the conclusions of law should be set forth in the pleading, provided the court can see, from any point of view, from the facts stated that a legal obligation rested upon the defendant. *Eno v. Woodworth*, 4 N. Y. 249.

The inquiries in this case are, first, whether the defendant was competent to enter into the contract alleged by the complaint to have been made; and, secondly, whether a valid contract was made between it and the plaintiff to do or perform the service undertaken by it.

The first question may be briefly disposed of, as no point is made as to the competency of the defendant to contract

to deliver telegraphic messages to persons addressed, and the sole inquiry is, therefore, whether the complaint shows that it has made a valid contract to do so.

The demurrer concedes that an agreement was made by which the defendant promised to deliver a message, expected to be received by it from the plaintiff's agent in Paris, addressed "Mentor, New York," to the plaintiff, at his residence, as soon as the same should come into its possession.

The facts alleged show that the plaintiff had made arrangements with his agent in Paris to obtain information upon business, in which the plaintiff was solely interested, and transmit it by telegraph to New York to the address of "Mentor." It also appears that the message was really intended for the plaintiff, and that it was duly received by the defendant, but was not delivered by it.

The sole claim of the defendant, therefore, is reduced to the contention that the complaint does not show a good or sufficient consideration for its promise to deliver such message, and that no legal duty rested upon it to deliver the same to the plaintiff. We think that this complaint, under the rules of law applicable to questions raised by demurrers, does state a cause of action on the part of the plaintiff against the defendant. We can see no reason why the defendant is not liable to the plaintiff, upon the contract made by it with his agent in Paris, for the transmission and delivery of the message. So far as appears, the plaintiff was the only party interested in the business to which the message related, and the only person who could be benefited by the performance of that contract. It is quite obvious, from the averments in the complaint, that the defendant secured possession of the message under a contract to transmit and deliver it to the person answering the description of its address in New York. *Baldwin v. U. S. Tel. Co.*, 1 Lans. 125; *Leonard v. N. Y., etc., Tel. Co.*, 41 N. Y. 544. If the defendant had been unable, by reason of the fictitious address, to identify the person for whom it was intended, it would have been a sufficient

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excuse for its non-delivery ; but this difficulty was obviated before the duty of delivery fell upon the carrier, by the information given to and accepted by it, as satisfactory evidence of the identity of the person for whom it was intended. The rule that a principal is entitled to maintain an action upon a contract made by his agent with a third person, although the agency is not disclosed at the time of making the contract, has many illustrations in the reported cases, and is elementary law. *Coleman v. Bank of Elmira*, 53 N. Y. 388 ; *Briggs v. Partridge*, 64 id. 357 ; *Ford v. Williams*, 21 How. [U. S.] 288 ; *Dykers v. Townsend*, 24 N. Y. 57. This principle has been frequently applied in actions against telegraph companies, and is now the settled law of this country in respect to such corporations. *De Rutte v. N. Y., Albany and Buffalo E. M. Tel. Co.*, 1 Daly, 547 ; *Leonard v. Tel. Co.*, 41 N. Y. 544 ; *N. Y. & W. P. Tel. Co. v. Dryburg*, 35 Pa. 300 ; *Baldwin v. Tel. Co.*, 1 Lans. 128.

In *Leonard v. Telegraph Company* an action was sustained on account of a change made in the language of a telegram passing between two of the plaintiff's agents, by which a loss was inflicted upon their common principal. In *Playford v. United Kingdom Electric Telegraph Company*, L. R., 4 Q. B. 706, in an action brought by the person receiving a message against the telegraph company for having negligently changed the terms of the dispatch, in course of transmission, whereby the plaintiff suffered damage, by acting upon it as received, it was held that the company was under no contract obligation to the plaintiff to deliver the message correctly, but it was conceded if the senders had been the agents of the plaintiff in the business to which the message related, that a recovery could have been had. Some of the authorities in this country go still further and hold that a telegraph company rests under a legal duty to the person to whom a message is addressed, when he is the party solely interested, to transmit it correctly and deliver it to him ; but it is unnecessary, in this case to pass upon that question, and we therefore express

no opinion upon it. *De Rutte v. Tel. Co., supra; Wadsworth v. W. U. Tel. Co.*, 38 Alb. L. Jour. 87. We are, therefore, of the opinion that the plaintiff could avail himself of the obligation of the original contract for the transmission of the message, and recover, for a breach thereof, such damages as he might be able to show he had suffered from the alleged breach. We are also of the opinion that, aside from the contract referred to, the complaint states a valid contract between the plaintiff and defendant, made at New York in anticipation of the arrival of the message at that place. It alleges that the plaintiff stated to the defendant that he was expecting a message from Paris addressed "Mentor, New York," and was the individual intended by such address, and requested the defendant to deliver it to him at his residence in that city. The plaintiff then offered to pay for such service in advance, which the defendant declined to accept, but entered plaintiff's name in its register as that of a person entitled to receive messages addressed to "Mentor," and promised to deliver such message, in accordance with such request, at plaintiff's residence, when received by it. That this was a service which the defendant was authorized to contract to perform is obvious from the usual course of telegraphic business, and the necessities of the case. The fact that the defendant had contracted with another person to transmit and deliver the same message, especially as it claims that it did not thereby come under any legal duty to the plaintiff to seek him out and deliver the message, would not preclude it from making a contract with the person addressed, for a special mode of delivery to him. If the plaintiff, intending to go to a distant city, had contracted with defendant to repeat such message to him there, could there be a doubt as to the validity of such a contract? And we think it equally within the contractual power of a telegraph company to agree to such special delivery, either without or within the limits of its usual delivery, with the person expecting to receive a particular message. It is

said, however, that there is no consideration alleged for this promise.

If it can fairly be inferred from the facts alleged that the parties expected compensation to be made for the services promised, and the payment of such agreed compensation could be enforced by the promisee, a sufficient consideration appears for the undertaking. There is no doubt but that reciprocal promises are a valuable consideration for each other, and that the law will usually imply a promise to pay for valuable services rendered to a party upon his request. *Pollock on Cont.* 161; *Coleman v. Eyre*, 45 N. Y. 38; *Briggs v. Tillotson*, 8 Johns. 304. That it was expected by the parties that the plaintiff should pay for the delivery of the message is obvious from his offer to do so in advance, and although this was waived by the defendant, that did not preclude it from demanding and enforcing the collection of payment for services performed by it, in pursuance of plaintiff's request. If the complaint had, in terms, alleged a promise to pay for such services, this would have authorized a finding of such promise upon proof of the facts stated in the complaint; and we think that, upon demurrer, the law will imply such a promise, and that the complaint must, therefore, be held to have alleged a good cause of action. *Marie v. Garrison, supra*; *Eno v. Woodworth, supra*; *Justice v. Lang*, 52 N. Y. 323. For the reasons stated, we think the demurrer should have been overruled.

The judgments of the courts below are, therefore, reversed, and the demurrer overruled, and the defendant has leave to answer the complaint upon payment of all costs and disbursements accruing since the demurrer was interposed.

All concur; EARL, J., on second ground stated in opinion. Judgment reversed and ordered accordingly.

NOTE.—See INDEX to this and to previous volume, title "Receiver or Addressee."

See note, vol. 1, p. 89.

For other New York cases, see note to *Mowry v. W. U. Tel. Co.*, *post*.

L. R. BENNETT v. WESTERN UNION TELEGRAPH CO.

New York Supreme Court, General Term, Fifth Dept., Oct. 19, 1888.

(18 State Reporter, 777 ; 2 N. Y. Supplement, 365.)

ERROR IN TRANSMISSION OF UNREPEATED OR UNINSURED MESSAGE.—LIMITING LIABILITY.—DAMAGES.—PRESENTATION OF CLAIM.

The usual stipulations contained in telegraph blanks, limiting the liability of the company in case of error, delay, &c., in transmission, where the message is not repeated, or, if repeated, is uninsured, are valid, and in absence of gross negligence, must be strictly observed by those dealing with the company.

Circumstances held to constitute sufficient presentation of claim for damages.

Cases of this series cited in opinion: *Young v. W. U. Tel. Co.*, vol. 1, p. 187 ; *Kiley v. W. U. Tel. Co.*, ante, p. 650.

APPEAL from judgment of Wayne County Court, entered upon the verdict of a jury.

Action for damages. Facts appear in opinion.

E. W. Hamm, for appellant.

C. H. Ray, for respondents.

DWIGHT, J. : The action was to recover damages occasioned by the inaccurate transmission of a telegraphic message from New York City to Lyons. The plaintiffs (father and son) were dealers in horses at the latter place. On the 6th of June, 1887, the elder Bennett, being in New York, and wishing to have a particular horse shipped to him from home, visited one of the offices of the defendant in the city, and wrote on one of the blanks usually supplied to customers for that purpose the message addressed to his son, at Lyons, "ship the brown horse, Kilburn horse."

The message was handed to the operator, read aloud by him, and correctly, to the writer, paid for by the latter at the usual rate for an unrepeatd message, and left for transmission. When the message was received at Lyons and delivered to the younger Bennett the letter "s" was added to the last word, so that it read "send the brown horse, Kilburn horses." The younger Bennett, doubting the correctness of the copy of the message received by him, took it to the Lyons office, where he learned that it had been correctly transcribed from the message there received. On the advice of the operator, he telegraphed to his father to learn what the message was intended to be, but his father having left the city for the day, he received no answer to that communication. He then, as he testifies, asked the operator if the first message could be repeated, and, being told it could, said: "I wish you would find out right away." To the direct question "did you then request him to repeat it?" he answered "I did, and he said I will; I will get it right for you." The operator testifies that the conversation was as follows: "He told me he thought there was a mistake in that message, * * * and asked if there was any way to find out, and I told him I would ascertain from the office sending on the message and see if my copy was correct, which I did. * * * He did not request me to repeat the message to New York at any time." The operator did procure the message to be repeated to him from the Syracuse office from which it had been transmitted to Lyons, and the second transmission being the same as the first, testifies that he reported that fact to the younger Bennett. The latter did not pay, or offer to pay, for the repetition of the message, but testifies that he thought the expense would be charged to the firm in the account which they were accustomed to have with the telegraph office.

The younger Bennett thereupon proceeded to ship three horses to his father in New York, the result of which action was the damages of fifty-one dollars, by way of freight and expenses, for which this verdict was rendered.

The plaintiff in New York, having received a dispatch the next morning informing him that the three horses had been shipped, went to the office from which he had sent the original message, complained to the operator of the mistake which had been made, and was directed by him to the principal office of the defendant.

There he was informed by the person in charge, who said he was the clerk of Mr. Homiston, the office manager, that the latter was busy, and he was requested to make his business known to the clerk. He thereupon stated his complaint, which the clerk said he would take down in writing, and which he proceeded to do. The clerk then took the plaintiff to another room in the same building, where he introduced him to a gentleman whom he represented to be the attorney of the company, Mr. George A. Feron, and to whom he handed the paper which he had written. Mr. Feron said he would investigate the matter, and write the plaintiff in ten days. After the expiration of that time, the plaintiff, L. R. Bennett, wrote Mr. Feron a letter from Lyons, calling his attention to the subject. This letter was produced on the trial by the attorney of record, who also tried the case for the defendant. To this letter the plaintiff received an answer from Mr. Feron, written under a printed heading, which described him as the attorney for the Western Union Telegraph Company, and inclosed in an envelope, upon which was printed a direction to return, after ten days, to the Western Union Telegraph Company, attorney's office, in which the plaintiff's claim was rejected on the ground, in substance, that it was not within the contract of the company, evidenced by the printed matter of the form on which the message was written.

All the evidence in relation to the presentation of this claim was objected to on the ground that it was not shown that the persons with whom the plaintiff dealt were authorized to act or speak for the defendant. We think these objections were not well taken, and that there was sufficient evidence, *prima facie*, to establish the fact that

the complaint reached the defendant, and satisfied the requirements of the contract in that respect.

But upon the other questions in the case our decision must be adverse to the judgment. The law applicable to those questions seems to have been settled by repeated adjudications of our own court of last resort, as well as the courts of other States. The decisions referred to concern themselves with the contents and effect of the printed matter borne on the face of the sheet on which the message of the plaintiff was written, to which his attention was invited by the words printed in large characters immediately beneath his signature, "Read the notice and agreement at the top;" in which prominence was given to the statement, "All messages taken by this company are subject to the following terms," and which contained the words, at the top of the space in which the message itself was written, "Send the following message, subject to the above terms, which are hereby agreed to."

The law must be regarded as settled to the effect that telegraph companies are not, unless by special contract, insurers, nor subject to the measure of liability imposed upon common carriers of merchandise; that they may limit their liability by reasonable stipulations; that the stipulations contained in the contract in this case are reasonable, and that the writer of the message, especially where, as in this case, he has been accustomed to use similar blanks, must be assumed to be aware of their contents, and to assent to the terms of the contract therein contained.

These propositions are fully sustained by the cases of *Breese v. U. S. Tel. Co.*, 48 N. Y., 132; *Young v. W. U. Tel. Co.*, 65 id. 163; *Kiley v. W. U. Tel. Co.*, 14 N. Y. State Rep. 816.

Among the terms of the contract thus binding upon the plaintiff was one to the effect that the defendant will not be responsible, even in case of negligence of its servants, for damages resulting from error or delay in the transmission of an unrepeatable message, beyond the sum paid for its transmission.

The printed matter also clearly points out what is meant by the term "repeated" in this connection ; using this language : "To guard against mistakes and delays, the sender of the message should order it repeated ; that is, telegraphed back to the original office for comparison. For this, one-half the regular rate is charged in addition." The sender of this message did not avail himself of this means of securing its correct transmission. He did not ask or pay for its repetition in any manner. His son at Lyons did make some effort to ascertain if the message was correct as received by him, but he did not direct that it should be telegraphed back to New York for comparison. What he suggested seems to have been that the operator at Lyons should procure the message to be repeated to him, and this was done from the office with which he was in direct communication. The message never was in fact "repeated" in the sense of the contract, and it is doubtful if the evidence would warrant the finding that any direction or request was made to have it so repeated. If not, then, under the condition of the contract already quoted, there was no liability on the part of the defendant for damages beyond the sum paid for the transmission of the message.

But, further, the contract equally limits the liability of the defendant in case of a repeated message, unless expressly insured, to a sum equal to fifty times the amount paid for transmission. So that if it were to be held that the message in this case was entitled to the terms of a repeated message, it was error to deny the defendant's motion to limit the recovery to the sum of \$12.50.

There is no ground for any contention in this case that gross negligence was chargeable to the defendant. On the contrary, it is rather open to question whether it was established that the error complained of was due to negligence at all.

But it is not necessary to consider that question more fully at this time. If the views already expressed are correct, whether this message was repeated or unrepeated, the court failed to give the instruction to the jury in respect to

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the measure of the defendant's liability, to which under the terms of its contract the defendant was entitled.

For this error the judgment must be reversed and a new trial granted.

Judgment reversed and new trial granted ; costs to abide the event.

All concur ; HAIGHT, J., in the result.

NOTE.— See INDEX to this and to previous volume, titles " Limiting Liability," " Damages."

See notes, vol. 1, pp. 44, 58.

For other New York cases, see note to *Mowry v. W. U. Tel. Co.*, *post*.

JOHN ELSEY v. THE POSTAL TELEGRAPH COMPANY.

Common Pleas of New York City and County, General Term, Dec. 3, 1888.

(15 Daly, 58.)

MIS-DELIVERY OF TELEGRAM.— RIGHT OF RECEIVER.— DAMAGES.

The agent of the defendant at the terminal office, failing to find a person of the same name as that to which a telegram was addressed, changed the name and delivered it to the wrong person, who shipped goods, upon the strength of it, to the sender of the telegram. The goods were refused, and, being perishable, were spoiled.

Held, that the person who shipped the goods could recover of the company, and that the measure of his damages was first, the value of the goods, and second, the cost of shipment.

Cases of this series cited in opinion : *Harris v. W. U. Tel. Co.*, vol. 1, p. 37 ; *De La Grange v. S. W. Tel. Co.*, vol. 1, p. 59 ; *Atkin v. W. U. Tel. Co.*, vol. 1, p. 121 ; *Hadley v. W. U. Tel. Co.*, *ante*, p. 542 ; *Wadsworth v. W. U. Tel. Co.*, *post*.

ACTION for damages caused by mis-delivery of a telegram. The facts are stated in the opinion.

A. W. Kent, for appellant.

Beandy & Hatch, for respondent.

VAN HOESSEN, J.: A Mr. Canham sent by the Postal

Telegraph Cable Company, from Port Huron, a dispatch ordering the shipment to him of 5,000 oysters. Mr. Canham wished to send the dispatch to a Mr. P. Ellsworth, an oyster dealer of the city of New York, but, being unable to recall the name of Ellsworth, wrote in its stead the name of Elsey, so that the dispatch was addressed to P. Elsey, New York. In telegraphic characters the letter "P" is represented by five dots, and the letter "H" by four dots, and the omission of a single dot resulted in the changing of the address from P. Elsey to H. Elsey. The person in charge of the New York office consulted the New York directory, and, not finding any H. Elsey in its list of names, concluded that the dispatch must be intended for John Elsey, a fish and oyster dealer of Washington market, and therefore altered the address by changing the letter "H" into the letter "J." The dispatch, so altered, was delivered to John Elsey, who filled the order, and shipped the oysters to Canham, who refused to receive them, saying that the man he dealt with was P. Ellsworth, whose name he had then recollected. The oysters were spoiled; and Elsey brings this action against the postal company, claiming the value of the oysters, together with the cost of transportation.

According to the English decisions, the defendant would be entitled to judgment in its favor. The English courts hold that the liability of the telegraph company to the recipient of a message could arise only from the negligence of the company; that there can be no negligence unless there be a duty owing by the party in default to the party aggrieved; and that such duty must arise either out of a contract or of some rule of law; that the sender has, but the person to whom the message is delivered has not, a contract with the company, so that the supposed duty does not arise out of contract; and that the law has not imposed upon the company any duty growing out of considerations of public policy. Said Baron BRAMWELL in *Dickson v. Reuter*, 30 Moak Eng. R. 1: "To hold that the duty is implied by law requires that the law shall be altered so as

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to make a person liable for a misrepresentation made carelessly, but without evil intent. But it is never laid down that the exemption from liability for an innocent misrepresentation is taken away by carelessness. It is argued that the consequences will be mischievous if this action be not maintainable. I am not of that opinion. If a person should be held liable for a negligent misrepresentation, made *bona fide*, a great check would be put upon many useful and honest communications, owing to a fear of being charged with negligence. The company is liable to the sender of the message, and that is a security for the proper delivery of messages, apart from the natural desire to carry on business properly, so as to gain customers." That view of the rights of recipients of messages has never been accepted in this country. In the early case of *De Rutte v. New York, A. & B. Telegraph Company*, 1 Daly, 547 (decided in March, 1866), it was decided that the recipient might maintain an action against a telegraph company for damages resulting from negligence in the transmission of a dispatch, and from that time to this courts in most of the States have uniformly held the same way. The following are some of the cases in which persons who received messages without any contract with the telegraph company have been compensated in damages for injuries arising from the negligence of the company in transmitting dispatches: *Ellis v. Am. Telegraph Co.*, 13 Allen, 226; *Rose v. U. S. Telegraph Co.*, 3 Abb. Pr. (N. S.) 408; *Harris v. W. U. Telegraph Co.*, 9 Phila. 88; *De La Grange v. S. W. Telegraph Co.*, 25 La. Ann. 383; *Aikin v. Telegraph Co.*, 5 S. C. 358; *Hadley v. W. U. Telegraph Co.*, 15 N. E. Rep. 849; *Wadsworth v. W. U. Telegraph Co.*, 8 S. W. Rep. 580; *Pearsall v. W. U. Telegraph Co.*, 44 Hun, 532; *Elwood v. W. U. Telegraph Co.*, 45 N. Y. 549; *N. Y. Telegraph Co. v. Dryburg*, 35 Pa. St. 298. Among American text-books, the following assert that the recipient of a message, if damaged by an error negligently made by the company, may recover damages; Cooley on Torts (2d ed.), 775; Gray on Telegraphs, § 65; Wharton on

Negligence, § 758 ; 3 Sutherland on Damages, 314 ; Shearman & Redfield on Negligence, § 560 ; 2 Thompson on Negligence, 847. The same reason for holding the company liable to the recipient of the message for negligence has not at all times been given by American courts and text writers. Sometimes it has been said that the principle enunciated in *Lawrence v. Fox*, 20 N. Y. 268, controlled, and that the company and the sender of the message, when they contracted for the sending of the dispatch, did so with a view to the benefit of a third party, namely, the person to whom the message was sent. In such a conjuncture, the person whose benefit the contracting parties had in contemplation may maintain an action if injured by the non-performance of the contract. *Hadley v. W. U. Telegraph Co.*, 15 N. E. Rep. 850 ; Shearman & Redfield on Negligence, § 560. In other cases the liability of the company is placed upon the ground that the company has a *quasi* public employment, and enjoys the benefit of the right of eminent domain, and that the multitude and importance of affairs daily transacted upon the faith of the intelligence it conveys make it expedient to require that the business shall be done without negligence. Nowhere has the question been considered with greater breadth and clearness than in the opinion of Chief Justice DALY, in the *De Rutte* case, *supra*, in which it is said : “ If we leave out of view altogether the question with whom was the contract made, the defendants would still be liable to the plaintiff for putting him to loss and damage through their negligence in transmitting to him an erroneous message. The law upon this subject is as yet undefined, for the business is of recent origin. I have pointed out this distinguishing feature : that, though pursued for reward, it is designed for the general convenience of the public. Like the business of common carriers, the interests of the public are so largely incorporated with it that it differs from ordinary bailments, which parties may enter into or not, as they please. In the State of New York it is made by statute the duty of the companies to transmit dispatches from and

for any individuals with impartiality and good faith. Common carriers are held to the responsibility of insurers for the safe delivery of the property intrusted to their care, upon grounds of public policy, to prevent frauds, or collusion with thieves, and because the owner, having surrendered the possession of his property, is generally unable to show how it was injured or lost. These reasons, which are the ones usually assigned for the extraordinary responsibility of common carriers, cannot be regarded as applicable to the same extent to telegraph companies; nor are there any reasons, in my judgment, why they should be held to the extent of insurers for the correct transmission of dispatches. As their business, however, is one that leads to their being intrusted with confidential and valuable information, especially in commercial matters, there are opportunities for frauds and abuses, which, in view of the relation they occupy to the public, make it necessary, upon grounds of public policy, that they should be held to a more strict accountability than ordinary bailees. As the value of their services consists in the message intrusted to them being correctly and diligently transmitted, it must be taken for granted that they engage to do so; and if there is unreasonable delay, or an error committed, it should be presumed that it arose from their negligence, unless they can show that it occurred from causes beyond their control." It seems to me that the better ground on which to place the liability of the company for negligence is that the law, from considerations of public policy, will, to quote the language of Chief Justice DALY, "take it for granted" that the company, by accepting the message for transmission, impliedly promises both sender and recipient that it shall be forwarded with care commensurate with the importance of the work.

Of the negligence of the defendant in this case there can be no question. No matter how good the motive of the man in the New York office—and there can be no doubt that he honestly believed that he was acting for the best—he had no right to alter the address so as to make it suit

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some name that he found in the directory. The defendant is liable, and the damages are: First, the value of the oysters; and, secondly, the cost of sending them to Port Huron.

BOOKSTAVEN, J., concurs.

Judgment affirmed.

NOTE.—See INDEX to this and to previous volume, titles "Receiver or Addressee," "Damages."

See notes vol. 1, pages 39, 58; vol. 2, p. 654.

For N. Y. cases on liabilities of telegraph companies, see note to next case.

HENRY J. MOWRY ET AL. V. THE WESTERN UNION TELEGRAPH COMPANY.

New York Supreme Court, General Term, Third Dept., Jan., 1889.

(51 Hun, 126.)

DELAY OF TELEGRAM.—LIMITING LIABILITY.—DAMAGES.

A telegraph company cannot, by stipulation printed in its message blanks, exempt itself from liability for injuries caused by its gross negligence or that of its agents or servants.

Mislaying a telegram and thereby delaying its transmission for a week is gross negligence.

The proper measure of damages, in case of loss sustained by negligent delay of a telegram the importance of which was or should have been known to the operator, where the loss caused depends on a rise in market values, is the amount of such rise during the period of delay.

A telegram in this language, "Will take two cars sixteen. Ship as soon as convenient *via* West Shore," presented for transmission in answer to a message delivered on the same day from the same office, stating the price of "pickled hams, sixteens," sufficiently apprised the operator that the message was important and that its delay might cause loss.

Cases of this series cited in opinion: *Sprague v. W. U. Tel. Co.*, vol. 1, p. 204; *Thompson v. W. U. Tel. Co.*, vol. 1, p. 772; *Manville v. W. U. Tel. Co.*, vol. 1, p. 92.

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ACTION for damages. Trial at Onondaga County Court.
Appeal by defendant.

J. William Wilson, for appellant.

Hiscock, Doheny & Hiscock, for respondents.

MARTIN, J.: That this action was properly brought against the defendant is not questioned. On August 7, 1885, the plaintiffs received through a telegraph office at Syracuse, managed and controlled by the defendant, the following message :

“ Dated, CHICAGO, Illinois, 7th.

“ Received at Syracuse, N. Y., 11.50 A. M., August 7, 1885.

“ *To Mowry & Barnes*: Pickled hams, sixteens, nine and a half ; shoulders, five quarters ; lard, six thirty-two and a half ; beef hams, nineteen.
ARMOUR & Co.”

On the same day, and after the receipt of this message, the plaintiffs prepared and caused to be delivered to the defendant at the same office a message which was as follows :

“ SYRACUSE, August 7, 1885.

“ *To Armour & Co., Chicago*: Will take two cars sixteens. Ship soon as convenient *via* West Shore.
MOWRY & BARNES.”

The plaintiffs paid the regular tolls or charges established by the defendant for the transmission and delivery of the message, but not the charges for a repeated message. The blank upon which this message was written contained the following provisions :

“ All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a message should order it repeated ; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same. * * * The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message.”

The message from the plaintiffs to Armour & Co. was in answer to the message by Armour & Co. to plaintiffs, whereby they offered to the plaintiffs hams, sixteens, at nine and one-half cents per pound ; and plaintiffs' message was an acceptance of such offer, and an order for two car loads of such hams at that price. When the plaintiffs' message was delivered at the defendant's office the operator in charge placed it among the messages to be sent. When, in the order of transmitting messages, it was reached, it was taken by the defendant's operator from the place where messages to be sent were kept, and he called the office to which it was to be transmitted, and found the wire in use. While waiting, his attention was engaged by some person having business at the office, and before attending to him the operator placed the plaintiffs' message among the messages that had been sent. As a consequence the message was not sent until seven or eight days afterwards, when the plaintiffs called the operator's attention to the fact that it had not been sent. It was then sent without the plaintiffs' knowledge. Between the time of the delivery of this message to the defendant and the time when the plaintiffs first learned that it had not been sent, the market price of the hams ordered advanced one-half a cent a pound, and by reason of the defendant's neglect to send such message the plaintiffs were compelled to pay \$225 more for the same goods than they would have purchased them for if such telegram had been sent and delivered within a reasonable time. Within sixty days after the delivery of such message the plaintiffs presented a claim to the defendant for the damages sustained by them, which was rejected by the defendant, except that it offered to repay the plaintiffs the sum paid for the transmission and delivery of such message. On the trial the court found that the omission to send such message was due to the gross carelessness and negligence of the defendant ; that by reason thereof the plaintiffs sustained damage to the amount of \$225 ; and ordered judgment for the plaintiffs for \$200 and costs.

The only question presented on this appeal is the question of damages. The defendant claims that the only damages that the plaintiffs were entitled to recover was the sum of twenty-two cents paid for the transmission and delivery of this message. This claim is sought to be maintained on the grounds: *First*, that the defendant's liability was limited by the provisions contained in the blank upon which the message was written; and, *second*, that independent of those provisions the plaintiffs could recover only the sum paid for sending the message. Upon the first of these propositions the defendant, in its brief, says: "Telegraph companies have the right to make reasonable rules for the conduct of their business, and can limit their liability for mistakes not occasioned by gross negligence or wilful misconduct by notice brought home to the sender of the message, or by special contract." The correctness of this statement of the law is not disputed by the plaintiffs, so that the question is not as to the rule contended for, but as to its applicability to the facts of this case. The rule, as stated, excepts from its operation a liability occasioned by gross negligence or wilful misconduct. The plaintiffs claim that the loss sustained by them was caused by the gross negligence of the defendant. The court so found. We think the evidence sufficient to uphold that finding. Hence we conclude that the contract between the parties did not limit the plaintiffs' right of recovery to the amount paid by them for the transmission and delivery of the message. But the defendant also claims that the plaintiffs could only recover such damages as were the natural and necessary consequence of the defendant's failure to send this message; that the plaintiffs' telegram was designed for a special purpose, which was not disclosed to the defendant; and that the damages awarded were for an injury sustained by not accomplishing that purpose, and hence it was not liable. As sustaining this claim it cites the cases of *Baldwin v. United States Telegraph Company*, 45 N. Y. 744; *Hart v. Direct United States Cable Company*, 86 N. Y. 633; and *McColl v. Western Union Telegraph*

Company, 7 Abb. N. C. 151. The doctrine of the cases cited is that a telegraph company is not liable for a special loss caused by delay or non-delivery of a message where it has no notice, either by the contents of the message or otherwise, indicating its importance, or that special damages will result from its neglect. Assuming, as we do, without passing upon the question, that this doctrine is applicable where the injury results from the gross negligence of the defendant, the question is whether the doctrine of those cases is prohibitive of recovery of the damages awarded herein. In this case there was no evidence of any notice to the defendant of the purpose of the message, or its importance, or that special damages would result from a neglect to send it, other than that given by the contents of the message which the plaintiffs sought to have sent, and by the contents of the message received, to which the plaintiffs' message was a reply. But on the 7th of August the plaintiffs received a message from the defendant, which gave the price of hams, shoulders, lard and beef hams. In answer to that the plaintiffs on the same day delivered to the defendant at the same office this reply: "Will take two cars sixteens. Ship soon as convenient *via* West Shore." That the defendant must, from this transaction and from the contents of these telegrams, have clearly understood that the plaintiffs were accepting an offer made by Armour & Co., and purchasing two car loads of hams at the price named, there can be little or no doubt. We think that the contents of this message were such as to indicate clearly to defendant that it was important; that a contract for the purchase of two car loads of hams was being made by the parties, and that a failure to send the message must result in such loss to the parties as would naturally follow from a failure to complete such contract. We are of the opinion that the defendant was liable to the plaintiffs for the damages which were awarded in this case. *Leonard v. N. Y., A. & B. Electro Magnetic T. Co.*, 41 N. Y. 544; *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 263; *De Rutte v. N. Y. & A. B. E. M. Tel. Co.*, 1

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Daly, 548; *Bryant v. Am. Tel. Co.*, id. 575; *Sprague v. W. U. Tel. Co.*, 6 Daly, 200, affirmed 67 N. Y. 590; *Pearsall v. W. U. Tel. Co.*, 44 Hun, 532; *U. S. Tel. Co. v. Wenger*, 55 Pa. 262; *Squire v. W. U. Tel. Co.*, 98 Mass. 232; *Thompson v. W. U. Tel. Co.*, 64 Wis. 531; *Manville v. W. U. Tel. Co.*, 37 Iowa, 214. It follows that the judgment appealed from should be affirmed.

KENNEDY, J., concurred. FOLLETT, P. J., concurred in result.

Judgment affirmed with costs.

NOTE.—In *Hart v. The Direct United States Cable Co., Limited*, 86 N. Y. 683, cited in the above opinion, only a memorandum of the opinion is reported. The substance of the decision was that the telegram delivered to the addressee being an unintelligible jargon, the addressee, who was the agent of the plaintiff who sent the message, in taking it as an order to sell, took the risk of the interpretation.

See INDEX to this and to previous volume, titles "Limiting Liability," "Damages." See notes, vol. 1, pages 99, 58; vol. 2, p. 654.

The following New York cases on the liability of telegraph companies as carriers of messages are in vol. 1 of this series: *Tennant v. W. U. Tel. Co.*

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was short. The transmitting operator also testified that the receiving operator was incompetent.

Held, evidence of gross negligence, and that the taking of that question from the jury was error.

APPEAL from the Superior Court, Mecklenburg county.

This was a civil action tried before MONTGOMERY, J., at the November Special Term, 1886, of the Superior Court of Mecklenburg county.

The defendant is a duly incorporated company, whose business it is to transmit messages over its lines for pay.

The plaintiff was engaged in the city of Charlotte in the business of buying and selling railroad and other stocks for profit and one W. C. Sedden was engaged in similar business, under the firm name of W. C. Sedden & Co., in the city of Richmond, Virginia. On the fourteenth day of February, 1881, the plaintiff delivered to the defendant, at its office in Charlotte, for transmission over its line to the said W. C. Sedden, in Richmond, a message in the following words :

“ Party offers one hundred shares C. C. & A. at forty-three.. Answer quick.”

The charges for said message were paid, and the defendant company undertook and contracted, in consideration thereof, to transmit it. In response to the telegram so sent to the said Sedden, he caused to be transmitted to the plaintiff over the same line, on the same day, a telegram in the following words, to wit:

“ Will take one hundred shares. Draw at sight, with stock attached, if wish.”

The telegram delivered by the defendant company to W. C. Sedden at Richmond was not the one sent by the plaintiff, but was in the following words, to wit:

“ Party offers one hundred shares C. C. & A. at forty. Answer quick.”

The plaintiff alleges that in consequence of the offer of the stock at \$40 per share, as stated in the telegram delivered to the said Sedden in Richmond, he immediately sold the amount of said stock in Richmond at the price of \$41.75

per share, which was then the market price of the stock in that city, but in order to deliver the same he had to purchase other stock of the said railroad at that price or more, and that by reason of the said error in the price, and the negligence and carelessness of the defendant, the plaintiff was compelled to pay to the said Sedden the difference between 100 shares of said stock at \$40 per share, and the same stock at \$41.75 per share, and other costs and damages to the amount of \$250.

For a second cause of action he alleges that the mistake in the transmission of the message was owing to the gross and wilful negligence and carelessness of the defendant, whereby the loss and damage were sustained, for the recovery of which this action is brought.

The defendant admits the receipt and transmission of the message as alleged, but says that the price charged was only sixty-two cents, being the sum charged for messages of that length not required to be repeated to prevent mistakes, and says that the plaintiff was distinctly notified that mistakes were liable to occur in the transmission of messages, and that to guard against such mistakes it was necessary to repeat the message for comparison, and that the charge for so repeating was an addition of one-half to the regular charge; that the plaintiff was also distinctly notified that the defendant company would not be liable for failure in the correct transmission and delivering of said message unless the same was so repeated; that the plaintiff elected not to pay the additional toll or charge, but expressly agreed with the defendant that, in consideration of its sending the said message for the reduced toll, it should not be liable for any mistake or delays or for non-delivery of such unrepeated message, whether happening by the negligence of its servants or otherwise, beyond the amount received for sending the same, and that the defendant contracted to transmit the message upon this agreement, and that the mistake occurred in the course of transmitting over the wires and receiving it in Richmond.

The answer denies that the mistake was the result of carelessness or negligence, but was naturally incident to

unrepeated messages, always liable to occur; and of this the plaintiff had full knowledge and notice, and by his agreement exempted the defendant from liability in respect thereof.

To the second cause of action the defendant answers, denying that the error or mistake was owing to the gross and wilful carelessness or negligence of the defendant or its employés, and denies liability on account of said mistake.

The plaintiff testifies that he delivered the original message to the defendant company; that he writes a legible hand; and that he prepaid the charges. In a couple of hours after sending the message, he received a reply from Sedden & Co. The next day he discovered the mistake, by receiving a letter or message.

The plaintiff then offered to show that he did not read the printed matter on the telegram, and did not know its contents. This was objected to, and the objection sustained and exception noted. The printed matter referred to contains limitations upon the liability of the defendant in sending *unrepeated* messages, substantially as averred in its answer, and the printed request, preceding the written part of the message: "Send the following message subject to the above terms, which are agreed to."

There was a judgment for the plaintiff for the sum of sixty-two cents, the cost of the message, and he appealed.

W. P. Bynum and *Platt D. Walker* (*A. Burwell* was with them on the brief), for the plaintiff.

John Devereux, Jr., for the defendant.

DAVIS, J.: That the limitations restricting the liabilities of telegraph companies in the transmission of unrepeated messages are reasonable and proper, and that such limitations are binding upon the sender of a message who elects to take the risk of sending it unrepeated, rather than pay the small additional cost to secure accuracy, we regard as settled by the case of *Lassiter v. Telegraph Co.*, 89 N. C. 336, and the authorities there cited; but, as was said in that case: "The exemption is not extended to acts or omissions involving gross negligence, but are confined to

such as are incident to the service, and may occur where there is but slight attaching culpability in its officers and employés."

Negligence and gross negligence are relative terms. An act, under certain circumstances, might be simply negligent. The same act, under other circumstances, might be grossly negligent.

Undoubtedly a carrier would be charged with greater care in handling valuable glass than iron ware, or in transporting a package of gold than one of brass. So what might be slight negligence in a telegraph operator in transmitting a message of small apparent importance, might be gross negligence in transmitting one of apparently great importance.

Conceding that the defendant company had a right to limit its liability, and that the plaintiff was charged with notice of the printed matter contained in the telegram sent, but that such limitation did not extend to acts of gross negligence, was there evidence of such negligence in this case? It was the duty of the defendant company to employ competent operators. There was evidence tending to show that the operator at Richmond was not competent. The witness Dodge said: "I did not consider the operator at Richmond a competent man." Dodge was manager of the defendant's office at Charlotte, and testified as to the method of transmitting messages. He testifies that the message sent contained fourteen words, and that he sent it exactly as written. He says: "I telegraphed that I was sending fourteen words. I put fourteen words on the wires. It would be the duty of the receiving operator to answer 'O. K.' if he received the number of words. If the message received did not contain that number of words, * * * it was his duty to telegraph me that it was short. In this case I put the telegram on the wires correctly. He telegraphed me 'O. K.,' which means that he received the words correctly. I should say the wires were all right that day and in good working order. * * * I have been operating for thirty-seven years. I think I can give an opinion as to the competency of the operator at Richmond.

My opinion was that he was not a fair operator for that office." The message delivered to the operator at Charlotte contained a proposition to Sedden & Co. to sell them stock at "forty-three;" the message delivered read "forty," leaving out the word "three." The witness Dodge says: "It is possible, but hardly probable, that the word 'three' could have been lost; but by the exercise of ordinary care the mistake could have been avoided."

This case is clearly distinguishable from *Lassiter v. Telegraph Co.*, *supra*. In that case, the mere fact of the mistake was the only evidence of negligence. The number of words sent was the number of words received. There was no evidence as to how the mistake occurred, and no evidence of carelessness or incompetency on the part of the agents of the company. Nor was there anything to indicate that the message was of special importance. Could the mistake here have been avoided by the exercise of ordinary care? Or was it the result of gross negligence?

The only issues which his Honor allowed to be submitted were:

1st. Was the word "three" omitted by the gross negligence of the defendant or its servants?

2nd. What are the plaintiff's damages, if any?

The court instructed the jury that there was no sufficient evidence to go to them on which they could find there was gross negligence, and they must respond to the first issue—No.

We think there was evidence of gross negligence, and that the court erred in not submitting it to the jury.

The plaintiff is entitled to a new trial. Let this be certified.

Error.

Reversed.

NOTE.—*Lassiter v. Telegraph Co.*, cited in opinion, was overruled in 111 N. C. 187.

See INDEX to this and to previous volume, titles "Duty to Customers," "Limiting Liability."

See notes, vol. 1, p. 99; vol. 2, p. 616.

See notes to next two cases.

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M. P. PEGRAM v. WESTERN UNION TELEGRAPH COMPANY.*North Carolina Supreme Court, May 24, 1883.*

(100 N. C. 28.)

ERROR IN TELEGRAM.—DAMAGES.

The plaintiff sent a telegram to his brokers in Richmond, Virginia, stating that he could purchase 100 shares of a given stock at 43. In transmission, "forty-three" was changed to "forty." As a result the brokers answered that they would take the stock, and before its arrival sold it at 41.75.

As a result the brokers lost the difference in the value of the stock at the two prices, for which sum they sued the plaintiff in a Virginia court, which he defended, having first given the telegraph company notice to defend, and was defeated.

Held, that the company was guilty of gross negligence, for which it was liable to the plaintiff for the actual damage sustained by him.

That he could recover, however, only the price of transmission.

Case of this series cited in opinion: *W. U. Tel. Co. v. Hall*, post.

APPEAL by the plaintiff from a judgment of the Superior Court, Mecklenburg county, in an action for damages for negligent error in a telegram.

W. P. Bynum and *P. D. Walker*, for the plaintiff.

C. N. Tillett, for the defendant.

MERRIMON, J.: The plaintiff resided in the town of Charlotte, in this State, and W. C. Sedden & Co. were doing the business of brokers in the city of Richmond, in the State of Virginia, in the year 1881.

On the 4th of February of that year these brokers sent to the plaintiff a letter as follows:

"If your customer will offer one hundred shares (or any part of it) C. C. & A. R. R. stock, at forty-three, delivered here, please wire us at our expense."

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Afterwards, on the 14th of the same month, the plaintiff addressed to the brokers mentioned, a message, in these words :

“ Party offers one hundred shares C. C. & A. stock at forty-three. Answer quick.”

and he delivered it to the defendant to be transmitted over its telegraph. It is admitted that this message was not sent truly, but that the word “three” at the end of the word “forty” was omitted, so that the message, as transmitted by the defendant, contained the word “forty” instead of “forty-three,” as it should have done. The plaintiff paid the defendant 62 cents, the price required for sending the telegram, and the agent of the defendant understood at the time he sent the message that it referred to the stock of the Charlotte, Columbia & Augusta Railroad Company.

In about two hours after the message was so transmitted, on the same day, the brokers named replied to the plaintiff’s message as follows :

“ Will take the hundred shares ; draw at sight, with stock attached.”

Thereupon, at once, on the same day, the plaintiff purchased 101 shares of the stock mentioned, and made his draft on the brokers named for \$4,343, the price of the stock at “forty-three,” and sent the same to a bank in Richmond for collection, with the stock attached, with instructions to the bank to deliver the stock when the draft should be paid.

Afterwards, on the 16th of the same month, when the bank presented the draft for payment, the brokers were surprised at the amount of the same, and called upon the plaintiff for an explanation, who at once replied as follows :

“ My offer was forty-three plainly, and you replied, ‘ Will take stock,’ and I bought on your reply.”

The draft was not paid, and the stock was not delivered. This action is brought to recover damages sustained by the plaintiff by reason of the grossly negligent and false transmission by the defendant of his telegram to the brokers named above, on the 14th of February, 1881, as above stated.

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In the complaint it is alleged, among other things, that, in consequence of the plaintiff's telegram so falsely sent, the brokers named at once sold the stock named, then *in transitu*, to them as above stated, at the price of \$41.75 per share, which was the market value thereof in Richmond (the face value being \$100 per share); and, as they failed to get the stock from the plaintiff as they expected to do, they had to buy such stock to make their contract good at the price of \$41.75 per share or more; and that, in consequence of such negligence of the defendant, the plaintiff was afterwards compelled to pay the said brokers the difference between \$40 per share and \$41.75 per share of the stock, and other costs and damages, aggregating \$250.

On the trial, it was in evidence, that the plaintiff did not send his first telegram mentioned, in response to the letter of the 4th of February, 1881, of the brokers to him; and that the first knowledge he had of the missending of the telegram was the information he received from the brokers, as stated above.

It was likewise in evidence, that the stock named was not regularly quoted as to price, but it was quoted in the Richmond papers at \$41 to \$43, and the market value of it in Charlotte was \$42.50; that propositions between Charlotte and Richmond to buy and sell stock did not go beyond the day they were made.

It was likewise in evidence, that the brokers named brought their action against the present plaintiff in an appropriate court in the State of Virginia, to recover damages for his failure to deliver the stock he so contracted to sell them; that he made active and earnest defense thereto, but, nevertheless, the plaintiffs therein recovered from him \$175 as damages, as well as costs, and he had to pay reasonable counsel fees and other costs.

The plaintiff offered evidence to prove that he gave the defendant ample notice of the action, and its nature, so brought against him in the court of Virginia, to the end it might make defense thereto and save him harmless—that he would hold it responsible to him for any recovery

that might be had against him — that, after the recovery against him, he paid the judgment, costs, etc.

The defendant objected to this evidence; the court sustained the objection, and this is assigned as error.

There was much other evidence that need not be repeated here.

At the close of the evidence the plaintiff requested the court to give the following instructions to the jury :

“1. That if the plaintiff was sued by W. C. Sedden & Co., in a court in Richmond, Va., having jurisdiction of an action for the recovery of damages arising out of the mistake in the message, and Pegram, the plaintiff, gave the defendant company reasonable notice to come in and defend the said action, and the defendant company failed to do so, and Pegram, the plaintiff, in good faith, and with due diligence, defended the said action, and W. C. Sedden & Co. recovered judgment against him, the defendant would be estopped to deny its liability to the plaintiff, and the plaintiff would be entitled to recover the amount of the said judgment, with costs, provided said judgment and costs were paid by him.” This instruction was refused, and the plaintiff excepted.

“2. That if Pegram delivered his telegram of the 14th of February, 1881, to the defendant, not in answer to Sedden’s letter of the 4th of February, 1881, but as an original and independent proposition to Sedden to sell him the stock, then the defendant was the agent of Pegram, and liable to him for any damages sustained by him from its gross negligence in transmitting the message.”

This instruction was not given in the words asked, and the plaintiff excepted.

The court did instruct the jury that the defendant would be liable for gross negligence, and that if, by the exercise of ordinary care, the defendant could have avoided the mistake in the message, the jury should respond to the first issue, yes.

“3. That if the jury believe the evidence, the defendant

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was the agent of Pegram, and liable to him, by reason of its negligence in transmitting the message."

This instruction was not given in the words asked, but as above stated, and plaintiff excepted.

"4. That apart from the estoppel referred to in the *first* prayer of plaintiff for instructions, the measure of damages would be the difference between the price as stated in the Sedden copy of Pegram's message of the 14th of February, 1881, and the market value of the stock at Richmond, Va., on the day it was to be delivered to Sedden."

This instruction was refused, because the whole contention of the plaintiff, as it appears by his complaint, was, that his damage was that he "*was compelled to pay* W. C. Sedden the difference between 100 shares of said stock, at \$40 per share, and the same stock at \$41.75 per share, and other costs and damages," etc.; and the court held that plaintiff could not recover back the damage alleged in the complaint, and has proven no other except the amount paid for the transmission of the telegram. Plaintiff excepted.

His Honor stated, in his charge, on the second issue, that the plaintiff had proved no damages, except the amount paid for the transmission of the message, and this is 62 cents.

The plaintiff excepted to the instructions and charge given, and especially assigns as errors therein that his Honor, instead of the charge he gave, should have instructed the jury:

"1. That the plaintiff is entitled to recover as damages the difference between the price as stated in the telegram delivered by him to the defendant on the 14th day of February, 1881, and that stated in the telegram delivered to Sedden on said day, or the difference between the price of the stock as stated in the message, as delivered to Sedden by the defendant on said day, and its market value in Richmond, Va., on the day the stock was to be delivered to Sedden, or at the time Sedden first discovered the mistake; or that plaintiff is entitled to recover as damages at least

the amount recovered of him in the action by Sedden against him, and which he paid before this suit was brought, or said amount and the cost of said action so paid by him on said amount, and the cost and reasonable expenses incurred by him in defending the said action, after reasonable notice to the defendant and its refusal to defend the same, provided said amount, costs and expenses were paid by this plaintiff after notice thereof to defendant, given before this action was brought; and further, that plaintiff was entitled to interest on said amount so paid by him, and certainly entitled to recover interest if the jury should see fit to allow it."

There was a verdict for the plaintiff on the first issue submitted, and a verdict on the second issue submitted, in accordance with the instructions of his Honor, to-wit, that plaintiff was entitled to recover as damages 62 cents.

There was judgment for the plaintiff, from which he appealed to this court.

A brief reference to the nature and purpose of the defendant's employment will serve to throw light upon the plaintiff's cause of action, and the extent of damages to which he is entitled. It is a corporation, invested with powers, and has functions appropriate in kind and extent to effectuate and facilitate the transmission of intelligence from one place to another by means of electricity. The chief instrumentality it employs for its purposes is a machine, apparatus, or contrivance, styled the *electric telegraph* or *electro magnetic telegraph*—an instrument that conveys intelligence with the velocity of lightning, by means of signals, certain mechanical movements, or sounds, representing letters, words, ideas, or expressions, produced by the application of electricity—electric fluid—conducted through and along iron wires for any distance, long or short.

The business of the defendant ordinarily is, to employ its telegraph for the use, benefit, advantage and convenience of the public—all persons who desire to take benefit of it in the transmission of intelligence that may be lawfully

transmitted, upon the payment of reasonable compensation. In other words, its business is, by such means and appliances, simply to transmit intelligence—what one or more persons desire and intend to say or communicate to another or other persons at a distance—delivered to it for transmission, in the shape of messages, dispatches, telegrams, or communications, usually and properly in writing. Its office and undertaking are to transmit promptly, as directed, in the message to be sent, precisely what is said and expressed therein—that is, to transmit, by such signals, in the way indicated above, the exact words in their proper order and connection as set down in the message. In the absence of special agreement, it undertakes to do, and has authority from the sender of the message to do, no more.

Generally, when it receives the message, it agrees, in terms or by implication, to so send it, and has no other agency of the sender or of the person to whom it is sent. It has no authority or agency of the person sending, or to whom a message is sent, to make, modify, or alter at all the terms or effect of an agreement or proposition to buy or sell anything contained in the message it receives to transmit, or has been transmitted by it, or to bind a person sending or receiving such message. Its sole duty is to send the message, truly, and as promptly as may be, in the order of business. If it is negligent, and fails in this respect, the party injured by such neglect will have his cause of action against it, and may recover such damages as he has sustained.

Now, it appears that the defendant received from the plaintiff, and undertook, for compensation paid, to transmit for him, as directed, this message: "Party offers 100 shares C., C. & A. stock at forty-three. Answer quick."

It sent only a part of this message—it negligently omitted to transmit the word "three" at the end of the word "forty," thus materially changing the proposition to sell, and misinforming and misleading the party to whom it was sent, and causing the latter to send a message in reply that misled the plaintiff.

Such neglect created the plaintiff's cause of action alleged in the complaint, and he is clearly entitled to recover at least nominal damages, and such substantial damages as he has sustained ; that is, such as in the course of things were naturally the proximate consequence of the wrong complained of—such as the parties may have fairly contemplated by their contract in case of a breach thereof ; but not such as may have been the consequence of secondary and remote causes, indirectly growing out of such breach.

Thus, if the plaintiff, in consequence of the message received by him in reply to his, falsely transmitted by the defendant to the brokers in Richmond, purchased the stock referred to, and failed to realize for it what it cost him, and reasonable compensation for his labor and trouble about it, he might recover the amount so lost, and such compensation, and also the sum he paid for transmitting the message.

But he could not recover damages for any injury sustained by the persons—the brokers—to whom his message was falsely transmitted, by reason thereof, because the injury done to them was not an injury to him. He had no cause of action on that account ; they had, if they so sustained injury.

Nor was the plaintiff liable to the brokers for any such injury sustained by them, or on account of the breach of any contract with them created by the message as transmitted, because he did not send or direct the defendants to transmit the message it transmitted—he did not offer, or agree, to sell to the brokers the stock at “forty”—they had no contract with him.

As we have seen, the defendant had no agency or authority of the plaintiff to change or modify, in terms, the message he delivered to it to be transmitted to the brokers. It transmitted the false message to them in its own wrong, and it alone was answerable to them for an injury they sustained thereby ; the plaintiff had done them no injury ; the defendants may have done so in delivering to them the false message, upon which they may have acted to their detriment. If they did not, they could not have recovered

substantial damages. *West. U. T. Co. v. Hall*, 124 U. S. 444.

But it is earnestly contended by the plaintiff that the brokers named brought their action in a court in the State of Virginia, having proper jurisdiction, against him, and recovered judgment for damages and cost, which he paid, on account of such falsely transmitted message to them; that the plaintiff notified the defendant to appear and defend that action, and save him harmless, which it failed to do, and he is, therefore, entitled in this action to recover such outlay on his part as damages.

We cannot so decide. We are unable to see how an action upon a contract, never, in fact, made, could be successfully prosecuted against the present plaintiff; and it is still more difficult to comprehend how the damages he has sustained in such action, or any outlay of his therein, can be recovered by him in this action, there being, as we have seen, no privity between the plaintiff and defendant in that respect, and no such relations subsisting as to give the former cause for redress against the defendant, measured by the result of the action referred to, the only evidence of which was the transcript of the record thereof. Such evidence would be admissible, if an agent, in performing his principal's orders, should incur a personal responsibility and loss, and seek indemnity therefor against the latter on the ground of their relations. In such case, if the principal had notice of the action, its result would be conclusive as to the extent of the damage. But this is a very different case from one of that nature.

Here the present plaintiff was not answerable to the plaintiff in the action just referred to for injuries they sustained by the negligence of the present defendant, nor was the latter answerable therefor to the plaintiff in this action in any aspect of their relations. *Hare v. Grant*, 77 N. C. 203; *Leak v. Covington*, 99 N. C. 559.

As the defendant was not answerable to the plaintiff for any injury the brokers sustained by reason of the false message transmitted to them by it, the plaintiff cannot recover from the defendant, as damages in this action, any

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sum the brokers may have for any cause recovered from the plaintiff.

There is no error, and the judgment must be affirmed.

No error.

Affirmed.

DAVIS, J., wrote dissenting opinion.

NOTE.— This is the same case as the preceding, upon a new trial.
See INDEX to this and to previous volume, title "Damages."

D. F. CANNON, J. W. CANNON (and others), trading as Cannon, Fetzer & Wadsworth, v. THE WESTERN UNION TELEGRAPH COMPANY.

North Carolina Supreme Court, May 28, 1888.

(100 N. C. 300.)

DELAY OF UNREPEATED CIPHER DISPATCH — SPECULATIVE DAMAGES.

A verbal request to the operator to whom a cipher dispatch was presented for transmission, to send it so as to be delivered "before the cotton market opened," *held*, not sufficient notice of the importance of haste, the message being an unrepeatd one, to charge the telegraph company with the consequences of delay, in the absence of gross negligence.

The damage claimed being for loss of profits, and no contract having been actually made at the advanced rates, and so no actual loss incurred, *held* that only nominal damages could have been awarded.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Hall*, *post*.

APPEAL from Superior Court, Cabarrus county. Appeal by defendant from judgment awarding the plaintiffs damages for delay of telegram. Facts stated in opinion.

John Devereux, Jr., for the plaintiffs.

P. D. Walker, for the defendant.

SMITH, C. J.: The plaintiffs, Cannon, Fetzer & Wads-

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worth, cotton merchants, engaged in business at Concord, in this State, had entered into contracts with persons in New York, to deliver to them, respectively, 100 bales of cotton in December, 1879, and 500 in February of the next year. In order to provide for fulfilling said contracts, in the forenoon of the 3rd day of November preceding, they placed in the hands of the defendant's agent and operator a message to be transmitted over the wires to Tannahill & Co., their agents in New York, in this form :

"If market is firm and advancing, Narrator."

At a late hour, the same morning, about the hour of 11.45, and after receiving a telegram giving the state of the market on that day, a second message was sent, containing the simple word "Narrator," and omitting the prefacing conditions of the first. Neither of these dispatches had upon them any marks indicating the hour at which they were delivered to the operator, but each was indorsed by the operator with the hour at which it was sent, showing the first to have been started at 11.15 A. M., and the next at 12.35 P. M.

There being no direct single telegraphic wire connecting these points, it was necessary to transmit such communication, when required, to what are denominated relay offices, where the message was received, and, by repeating, forwarded to its destination, one of them, used at Concord, being at Charlotte, and the other at Greensboro; and messages were sent indifferently by the one or the other, whichever, less pressed with other business, could most speedily forward them.

The first of these messages passed through the Charlotte office, and thence was sent on to Richmond, where it could not be immediately forwarded, in consequence of the bad working of the wires from atmospheric or other disturbing cause, and the consequent accumulation of business in the office, and suffered some delay, reaching New York at 1.20 P. M.

The latter message, passing through and stopping at

Greensboro, with the greater facility afforded them by that route, arrived and was delivered three minutes earlier than the first.

There being nothing upon the face of either to show its priority in time, and the market not indicating a tendency to advance, the agents forbore to proceed, and did not carry out the instructions, exercising their judgment, as authorized, in the first forwarded and last received dispatch.

The Cipher Code, as the book is designated, in which, unexplained and unmeaning without, words are used by the plaintiffs to convey directions unintelligible to others than those who have learned it, contains, according to the testimony of one of the plaintiff firm, 180 pages, with about 20 ciphers on each, and 35 such on the page whereon the word "*narrator*" is found. The telegraph operator had before been in the plaintiff's service, and seen the book; but as he declared, when giving in his testimony, did not know its cipher import, nor understood the importance of the communication, though as the plaintiff, J. W. Cannon, who handed in the first message at 9.30 A. M., swore that in doing so he informed the operator, W. H. Holt, of his wish for the prompt sending off of it, in order that it might reach New York, if possible, before the opening of the cotton market that day.

The dispatches reached that city, and were delivered to the agents, Tannahill & Co., one hour and a half before the closing of the cotton exchange, which is at 3 P. M., and they were proceeding to make the purchase under the unconditional order when they were stopped by the first order, the filling of which was dependent on the state of the market, which was not firm, and funds of the plaintiffs sufficient for the purpose were in their hands.

On November 3rd, cotton futures, deliverable in December, were selling at 11.01, and in February at 11.27. The next day the exchange was not opened, it being a legal holiday, and on the 5th day of November the price had advanced for these deliveries, as it did further on the day succeeding, to 11.39 and 11.65, respectively.

The messages were sent on printed forms, in the upper part of which (and to this attention is called in a memorandum at the foot, in large capital type) is the following clause :

“All messages taken by this company are subject to the following terms :

“To guard against mistakes or delays, the sender of a message should order it repeated ; that is, telegraphed back to the originating office. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, whether happening by negligence of its servants, or otherwise, beyond the amount received for sending the same ; nor for mistakes or delays in the transmission or non-delivery of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured ; nor in any case for delays arising from unavoidable interruption in the workings of its lines, or for errors in cipher or obscure messages.

“And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.”

Then follows a clause providing for insuring the correct transmission of the message over the lines of the company at an additional charge of 1 per cent. for 1,000 miles or less, and 2 per cent. for a greater distance.

It does not appear that the plaintiffs, by their agents or otherwise, made any contract for the purchase of cotton to meet their own future deliveries at the enhanced or at any price ; and under the directions of the court the jury were allowed to estimate the damages at the difference in price in the article on the 3rd and 5th days of the said month, the advance between those dates being found by the jury to be \$855 on the entire lot, with the liberty of allowing interest thereon, which the jury did give, at the rate of 6 per cent. per annum. To this instruction, as well as to many others given or refused when requested by defendant's counsel, exception was entered, which we do not find it necessary to examine, nor indeed to determine the effect

upon the defendant's liability for the alleged negligent delay in transmitting the message.

Without passing upon the question of the plaintiffs' own culpability in sending off a second so near the first message, without any intimation upon its face that a previous one had been sent, which the last was intended to modify, and with no allusion whatever to it, a fact which seems to have caused the perplexity in the minds of the agents as to what ought to be done, and in consequence they did not act at all; or upon the indifference of the agents themselves in not at once inquiring by telegraph, the meaning of the conflicting communications, and regulating their conduct by the information thus obtained, we think it was but a reasonable requirement, that the importance of the message, and of its speedy, as well as accurate, transmission, should have been known to the receiving operator, so as to stimulate his activity in forwarding it, in more distinct and direct terms than those testified to by the partner. The message itself speaks no certain sound, and conveys to the reader (unacquainted with the new meanings affixed to words in the Code) no suggestion as to its real significance, as it did not, as the operator swears, to himself. This is but a reasonable requirement on the part of the company, and, if the sender chooses to speak in unintelligible language to those who are to pass it over the wires, it is due to the company, if it is to be held responsible for serious damages, that the information of its importance should be given to the sending operator, in order that he may communicate it to an intervening agency employed in forwarding, and thereby diligence and care be secured from each. If the message be in the form of a proposal to buy or sell on certain terms, so that in case of concurring minds a contract would result, its importance would appear on its face; if not thus disclosed, and a party chooses to send a single unrepeated message, liable to be misunderstood and erroneously conveyed in passing through other offices, when, at small additional expense, the mistake could be avoided, it should be at his own risk, in the absence of gross and

inexcusable negligence on the part of the company and its servants.

Such is the import of the ruling in *Lassiter v. Tel. Co.*, 89 N. C. 334, where the plaintiff assumed the hazard of a single communication, and acted upon it.

There are decisions which hold an analogy between public carriers of goods and public carriers of messages, and put the same rigid responsibility upon each. The supposed analogy is repudiated by others, as a message transmitted has not a property value like goods requiring safe custody and delivery.

But assuming some such similar relation to have been formed between them and the persons employing their services, it by no means follows, in either case, that the loss of a bargain made, or which might have been entered into, from which profit would have resulted, can be visited in damages upon the carrier, uninformed of the purpose or importance of the communication. Thus in *Horne v. Mid. Rail. Co.*, L. R. 7 C. P. 583 (a case commented on in Wood's May Dam., sec. 34, page 40), the plaintiff had contracted to deliver a lot of shoes in London on February 3, 1871, intended for the use of the French army, and, on delivering them to the company for transportation, he gave the information to the latter that the contract required a delivery on that day, but did not state the special nature of the contract. In consequence of the delay in the carriage, the contract could not be complied with, and the goods were refused. The market price had not varied between the day when the shoes were due and that on which they were received, but it was below the contract price, of which the company was ignorant. It was held that the company was not liable for this difference, it not having been advised of the special circumstances which led to the special loss.

And so, in *Sanders v. Stuart*, 1 C. P. D. 326, noticed in the next section of that work, the rule was extended to a telegraph company. The plaintiffs intrusted the defendant with a message in cipher to be sent by telegraph to America,

which was not delivered, and the plaintiffs lost considerable profits in consequence, which otherwise would have been made. The message was unintelligible to the defendant, and so intended to be, giving him no clue as to the special loss that might result from his negligence. It was held that no more than nominal damages could be recovered. But a more serious obstacle in the way of the plaintiffs' recovery of substantial damages is presented in the fact that they made no contract, from which either profit or loss could come, did not buy (the agents acting for them) at the advanced rates beyond what the cotton might have been bought for on the day of the reception of the messages, and for aught that the case shows, they might have bought at a subsequent time before they were required to deliver, at the same or at a reduced rate. However this may be, no actual loss is proved *to have been incurred*, and the loss is merely of an opportunity of making a bargain which would have been profitable had the goods been sold on the 6th day, at the market price then prevailing. It is not shown that any loss was sustained upon the plaintiffs' contract, from their being compelled to pay a higher price than that which ruled on the 3rd.

But the very point now under consideration came before the Supreme Court of the United States at a recent term. *W. U. Tel. Co. v. Hall*, 124 U. S. 444, and the opinion of Mr. Justice MATTHEWS is so full and his reasoning so conclusive, that we are content to refer to it as a controlling authority, and decisive of the case before us.

The defendant in error, plaintiff in the court below, at 8 A. M., November 9, 1882, sent from Des Moines, Iowa, by the company's line of telegraph, a message, upon a similiar form as ours, to Charles I. Hall, at Oil City, in Pennsylvania, as follows: "Buy ten thousand, if you think it safe. Wire me." The message was forwarded, and, from negligence and want of care, reached Oil City at 11 A. M. the same day, leaving out the name of the person to whom it was addressed. Had it been given, Hall would have received

it at 11.30, and would have bought the petroleum, meant in the message, at \$1.17 per barrel, the market price.

When the name was ascertained, and the dispatch delivered to Hall at 6 P. M., the exchange was closed, and at the opening next morning the price had advanced to \$1.35 per barrel, and in consequence, it being left to his judgment, Hall did not buy. The action was to recover the difference in price, to wit, 18 cents per barrel.

After an elaborate examination, following a full and exhaustive argument, with a large number of cited cases, the court came to the conclusion that the plaintiff could only recover the cost of the transmitting the message. The court say: "Of course, where the negligence of the telegraph company consists, not in delaying the transmission of the message, but in transmitting a message *erroneously* so as to mislead the party to whom it is addressed, and *on the faith of which he acts in the purchase or sale of property*, the actual loss based upon changes in market value are clearly within the rule for estimating damages;" "neither does it appear," the opinion proceeds to say, "that it was the purpose or intention of the sender of the message to purchase the oil in expectation of profit to be derived from an immediate resale."

Brought to the test of this ruling, it is plain that there have been sustained no damages for which the law will give redress upon the defendant beyond a nominal sum. Had the goods been bought on the day of receiving the message, it was not with a view to sell on the day when the price had risen, but to provide for existing engagements, and it does not appear that it could not have been bought on as favorable terms afterwards, in time to fulfil those engagements; and, if so, the loss would be of expected, but uncertain, profits.

The rule is thus stated in a note at page 242 (332) in Ewell's Evans' Agency: "In this country the telegraph company is also liable (having referred to cases in which it is held that the liability is to the sender only in England) to the person to whom the message is transmitted, upon

delivery thereof, in case of an error in transmission attributable to the fault of the company, *when the error is attended with damage to the person receiving it*; referring, in support of the proposition, to Big. Torts, 277; Big. Lead. Cases on Torts, 619, 621, and several adjudged cases. Unquestionably, the same liability will arise when the damage results from an erroneous communication of the terms of a dispatch.

We have avoided an expression of opinion upon the numerous other exceptions taken at the trial, and will only repeat what was said, in substance, in *Lassiter v. Tel. Co.*, *supra*, in reference to the difficulties incident to a correct communication of intelligence over wires, and the reasonableness of a rule which, to insure entire accuracy, requires the message to be repeated: "The electric ticks to be given at one end of the line, and to be interpreted and read at the other, are not articulate sounds, like those of the human voice, and much more liable to be misunderstood, and the individual handwriting of the sender himself and his meaning may be misunderstood;" and again, quoting the words of Chief Justice BIGELOW: "The unforeseen derangement of electric apparatus, a breach in the line of communication at an intermediate point, not immediately accessible, occasioned by accident or by wantonness or by malice, the imperfection necessarily incident to the transmission of signs or sounds by electricity, which sometimes renders it difficult, if not impossible, to distinguish between words of like sound or orthography, but of different signification; these, and other similar causes, the effect of which the highest degree of care could not prevent, make it impracticable to guard against errors and delays in sending messages to distant points."

These suggestions point strongly to the reasonableness of the requirement of a *repeated* message, by which, at an inconsiderable expense, the error in a dispatch would be avoided, and that the company's responsibility should be made to depend upon its observance, especially when the

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cipher form is adopted, which furnishes to the operator no means of ascertaining its import.

But for the errors *pointed* out, the judgment must be reversed, and a new trial had in the court below.

Error.

Venire de novo.

NOTE.— See INDEX to this and to previous volume, titles “ Limiting Liability,” “ Damages.”

The case of *Lassiter* v. *W. U. Tel. Co.*, cited in the foregoing opinion, was overruled in *Brown* v. *Postal Tel. Cable Co.*, 111 N. C.

See note, vol. 1, p. 108.

NUSBAUM V. THE WESTERN UNION TELEGRAPH COMPANY.

Common Pleas No. 4 of Pennsylvania, January 3, 1885.

(42 Legal Intelligencer, 16.)

ERROR IN TELEGRAM.— CONTRIBUTORY NEGLIGENCE.

A telegram as delivered to the addressee contained the word “ ober.” It should have been “ obey.” The addressee interpreted it “ over,” which made nonsense of the message. *Held*, that he was guilty of negligence in taking no step to acquire the correct interpretation, and could not recover for the injury sustained.

FACTS stated in opinion.

Mayer Sulzberger, for plaintiff.

B. H. Brewster and *R. M. Schick*, for defendant.

Motion for rule to take off nonsuit.

Opinion by THAYER, P. J.: The plaintiff, who is a dealer in furs, contracted with Shoyer & Co. to deliver to them a lot of muskrat skins. The price of the article, it was alleged, is fixed by the London sales. Such a sale was to take place on a Tuesday ensuing the day on which the contract

was made. Shoyer & Co., anticipating that there would be a rise of ten per cent., at least in the price of muskrat skins, agreed to pay the plaintiff 22 cents a piece. If prices went higher, then the plaintiff was to receive more than 22 cents, and Shoyer & Co. were to inform the plaintiff by telegraph of the result of the London sales. The plaintiff went to Salisbury, Maryland. While there Shoyer & Co. sent him the following telegram by the defendant's line:

“ March 23, 1881.

“ To Isaac Nusbaum, Salisbury, Md. :

“ Obey instructions given Sunday. Rats ten higher. Everything else lower.
G. SHOYER & Co.”

The message as transmitted by the defendants and received by the plaintiff, read,

“ Ober instructions given Sunday. Rates ten higher. Everything else lower.
G. SHOYER & Co.”

The plaintiff alleged, and offered to prove, that he thought the word “ober” in the message received meant “over;” that he interpreted the message as received to mean that muskrat skins were ten cents higher than anticipated, and that in consequence he bought 2,800 skins, giving two cents a skin more than he otherwise would have paid, and that he lost in consequence \$560. The offer being objected to, was rejected by the court, and there being no other evidence, the plaintiff was nonsuited.

We think the offer was rightly refused. The message as received by the plaintiff was an insensible message. He had no right to guess that the insensible word “ober” meant “over,” and then to interpret the message as meaning that muskrat skins had advanced ten per cent. beyond the anticipated price on which his contract was based. When he received an insensible message, it was his duty to have telegraphed back for the correct message, or to ask his correspondent the meaning of it. There was no offer to show that he had done this. He was himself guilty of

negligence in assuming to act upon an interpretation of the message, which was totally unwarranted by the terms in which it was sent. It was certainly as easy to guess that "ober" meant "obey" as to guess that it meant "over." He took the risk of his own false interpretation, and can not hold the company responsible for his own negligence. Rule refused.

NOTE.—See note to *W. U. Tel. Co. v. Landis*, *post*.

THE WESTERN UNION TELEGRAPH COMPANY V. WILBERT
RICHMAN.

Pennsylvania Supreme Court, Feb. 7, 1887.

(19 Weekly Notes of Cases, 569.)

ERROR IN TELEGRAM.—UNREPEATED MESSAGE.—RIGHT OF ADDRESSEE.

The receiver of a telegram, altered in transmission, who by reason of the alteration has acted upon it to his loss, can recover the damages he has sustained in an action against the telegraph company, by whose negligence the error occurred.

The notice printed on the transmitting blank is to the sender, not the addressee.

In absence of notice upon the delivery blank, the addressee is not bound by his own previous information of the custom of the telegraph company to limit their liability upon unrepeated messages, nor chargeable with knowledge that the message delivered to him was unrepeated.

In such a case, if the addressee suspects error and calls the attention of the delivering agent to it, who informs him that he has telegraphed back and been answered that it is correct, the addressee is not then bound to ask that the message be repeated again.

The negligence of the company is *prima facie* established by proving the alteration of the message.

Cases of this series cited in opinion: *Harris v. W. U. Tel. Co.*, vol. 1, p. 839; *Aikin v. W. U. Tel. Co.*, vol. 1, p. 121; *W. U. Tel. Co. v. Neill*, vol. 1, p. 852.

ACTION for damages for error in the transmission of a telegram.

Opinion by ARNOLD, J., discharging rule for new trial:

The plaintiff, a resident of Yorktown, New Jersey, is in the business of store-keeping, and buying, selling and shipping poultry. In the month of October, 1884, he wrote to A. & M. Robbins, poultry dealers in the city of New York, inquiring what they would give for good young turkeys, and received this answer by telegraph:

<p>“Form No. 1, } “Telegraph. } “From New York. “<i>For Wilbert Richman</i>: Thirty-three cents for good young turkeys.</p>	<p>WEST JERSEY RAILROAD COMPANY'S TELEGRAPH. 10-15-1884. “A. & M. ROBBINS.”</p>
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When the plaintiff received this message from the operator, he said to him: “Tom, that seems high; haven’t you made a mistake?” The operator replied: “I thought it was high, too, and I asked back whether they meant thirty-three, and they said ‘Yes.’”

The plaintiff thereupon went out into the adjacent country, and bought 2,900 pounds of turkeys at 25 cents a pound. He shipped them to Messrs. Robbins on October 17, 1884, billing them at 33 cents a pound. The buyers declined to pay that price, and sent on the pay at the rate of 22 cents a pound, which was the amount they agreed to pay. The cost of packing and shipping to New York was one cent a pound, so that the actual loss which the plaintiff sustained was four cents a pound, while his loss of prospective profits was seven cents a pound. The message which the Messrs. Robbins sent was plainly written:

“THE WESTERN UNION TELEGRAPH COMPANY.

<p>“Send the following message subject } to the terms printed on the back } hereof, which are hereby agreed to. }</p>	<p>OCTOBER 15, 1885.</p>
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“*To Wilbert Richman, Yorktown, N. J*: Twenty-two cents for good young turkeys. A. & M. ROBBINS.

“~~READ~~ READ THE NOTICE AND AGREEMENT ON THE BACK OF THIS BLANK. ~~END~~”

The terms were substantially that, to guard against mistakes, the sender of a message should order it repeated; that the company shall not be liable for mistakes in any unrepeatd message, nor for mistakes in any repeated message beyond 50 times the sum received for sending the same, unless specially insured; and that no employé of the company is authorized to vary the foregoing. The plaintiff also testified that he had used the same forms in sending telegrams, and that he had them in his store; that he knew that Tom, the operator, telegraphs to or terminates at Philadelphia, and supposed that he asked back there; that was what he (the plaintiff) understood the operator to mean, although he did not give it a thought as to what place the operator meant when he said that he had asked back. The plaintiff did not have the message repeated or make any effort to verify the dispatch, other than the inquiry above mentioned.

It was admitted at the trial that the defendant, if liable at all, is liable as though the Yorktown office was on its own line, and under its control, and the operator in its employment. The defendant offered no testimony, whereupon the jury were told that the plaintiff was entitled to recover the difference between the amount he paid for the turkeys and cost of transportation to New York, 26 cents a pound, and what he received for the turkeys, 22 cents a pound—that is, 4 cents a pound on 2,900 pounds; but that he was not entitled to recover for the loss of any prospective profits.

“Where an action is brought for the loss sustained by acting upon a telegram, which, owing to the negligence of the agents of the telegraph company, was altered or in any respect untrue, the action sounds in tort, and is for a loss wholly different from that which the sender sustained through the non-performance of the contract. This point is settled by many decisions. It will be sufficient to refer to the *N. Y. & Washington Tel. Co. v. Dryburg*, 35 Pa. St. R. 298, and *Harris v. The Western Union Tel. Co.*, 9 Phila. 88, for a decisive statement of the law of this State

on this question. Both of these cases have been adopted by courts and text-book writers to such an extent that they may well be relied upon in similar cases as decisive adjudications of the law in this respect. The action is not founded upon the contract but upon the negligent act of the company in altering the message, thereby entailing a loss upon the receiver. The law is otherwise as to the receiver in England. *Playford v. Un. King. El. Tel. Co.*, L. R. 4 Q. B. 706.

“It is said, however, that the plaintiff, by his former use of telegraph blanks and keeping them on hand, had notice of the regulation of the company requiring messages to be repeated to secure accuracy and indemnity from loss. That point may be conceded so far as the sender of the dispatch is concerned, and it was so ruled in *Breese v. The U. S. Tel. Co.*, 48 N. Y. 132; but I have not been able to find any ruling that the receiver of the dispatch is so affected. Telegraph companies recognize this difficulty, and to avoid it usually deliver the message on a form which states that the company transmits and delivers messages only on conditions limiting its liability, which conditions have been assented to by the sender, and informing the receiver that the message is an unrepeatable message, and that the company will not hold itself liable for errors or delays in unrepeatable messages. Otherwise the receiver would not know whether the message had been repeated or not. There was no such notice in the form used in delivering the erroneous message to the plaintiff in this case.

“In *Ellis v. The American Tel. Co.*, 13 Allen, 226, it was held that the right of the receiver to sue the company must be treated as a right derivative through the sender, and that if the sender has no right to complain, because of his failure to order the message to be repeated, the receiver can not sue. In *Aikin v. The W. U. Tel. Co.*, 5 So. Car. 358, it was held that an express stipulation in the contract binds the receiver as well as the sender, and this was followed in *The W. U. Tel. Co. v. Neill*, 57 Texas, 283. Of all these cases it may be well to observe that while the claims of the

plaintiffs were laid in tort, yet they were treated and disposed of as if they were brought upon the contract, and that they are at variance with the decision of the Supreme Court of this State in Dryburg's case, *supra*.

"In *Sweatland v. The Ill. & Miss. Tel. Co.*, 27 Iowa, 433, the action was brought by the receiver, but the sender was his agent, and consequently the contract with the agent bound the principal, and the same may be said of Neill's case in Texas.

"It is said further, that the plaintiff knew that the dispatch was incorrect, or rather that he had suspicions of its correctness which put him upon inquiry, and so affected him with knowledge, and that the statement of the operator that he had asked back and that the message was correct, did not relieve the plaintiff from the duty to order the message to be repeated, because the company's blanks contain a condition that no employé of the company is authorized to vary the terms of the agreement. This contention would be of much weight if the action had been brought upon the contract and the company was an insurer of the correctness of messages transmitted by it. Then, there being no consideration paid for the insurance or for repeating the message, the plaintiff would have no right to complain. The prime object of the agreement is to secure accuracy in transmitting the dispatch; the earning of a premium or pay for repeating the message is secondary. When the plaintiff asked the operator if the message was correct, and was told that he had already asked back and that they said yes, what use or necessity was there for the plaintiff to do the vain act of again repeating it? That would be re-repeating it, and the question naturally arises: When is repeating to stop? Had the operator said that the message was correct without saying he had asked back, there might be some force in the argument of the defendant that the message had not been repeated, and that the operator could not waive the condition requiring its repetition. That would have been a waiver of the condition, but saying that he had already asked back was not a waiver of it. We are aware

that the Supreme Court of Texas, in Neill's case, *supra*, ruled that in an action *ex contractu* the failure to require the message to be repeated exonerated the company from liability, and that it was not a sufficient excuse for the plaintiff to show that he relied upon the declaration of the operator that he had already repeated the word (which was erroneous), and that it was sent as he delivered it. To permit this, the court said, would be to allow the hearsay statement of the operator to vary the terms of the contract made with the principal, and this, not only without consideration, but by retaining the consideration agreed upon for the guaranty against error. This, it will be remembered, was said in a case where the relation of principal and agent existed between the sender and receiver, and in an action *ex contractu*. How the operator could give anything but a hearsay statement we are not informed. We are unwilling to follow that reasoning in this case.

“In an action against a telegraph company for the injury sustained through acting upon an altered message, the plaintiff establishes *prima facie* the negligence of the company, by proving the difference between the message which the company was employed to deliver and that which it did deliver to him. Gray on Communication by Telegraph, section 77, and cases cited. That was shown in this case, and no legal excuse or defense being offered by the company, the verdict for the plaintiff was right.

“Rule discharged.”

Judgment having been entered on the above verdict, the defendant took this writ assigning for error the charge of the court aforesaid.

Silas W. Pettit (*John R. Read* with him), for plaintiff in error.

N. Du Bois Miller (*John Sparhawk, Jr.*, with him), for defendant in error.

Per CURIAM: The uncontroverted evidence shows the

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company was guilty of negligence, and the person receiving the dispatch did all that could reasonably be required of a prudent man. The notice on the back of the blank was to the person who sent the message, not to the one who received it. Judgment affirmed.

NOTE.— See note to next case.

See INDEX to this and to previous volume, titles "Limiting Liability," "Receiver or Addressee."

See notes, vol. 1, pp. 39, 58.

THE WESTERN UNION TELEGRAPH COMPANY V. J. B.
LANDIS ET AL.

Pennsylvania Supreme Court, Feb. 6, 1888.

(21 Weekly Notes of Cases, 38.)

DELAY OF TELEGRAM.— DAMAGES.— REQUEST FOR REPETITION.

Owing to a mistake in transmitting a telegram, the addressee, to whom it was transmitted by his agent, sold sheep at less than their value. In an action against the telegraph company, held that the measure of damages was the difference between the value and the selling price.

The addressee of a telegram suspecting error requested the operator to ask the sender if a word in the message was "six" or "sixty." The operator said he had done so and that it was "six;" it was in fact "sixty." *Held*, that this was a sufficient request to have the message repeated.

ERROR to Common Pleas No. 1 of Philadelphia county.

Appeal by defendant below, from a judgment in an action for damages for error in a telegram.

The plaintiffs were dealers in live stock in West Philadelphia. Their agent at East Liberty, having bought sheep for them, delivered the following telegram at the telegraph office there for transmission :

“EAST LIBERTY, Pa., April 27, 1882.

“To J. B. Landis, Abattoir, W. Phila: One cost six half two wooled Texas five sixty take all off earnings.
H ERISMAN.”

As the message was delivered to the addressee by a messenger of the company, the “sixty” was changed to “six.”

The addressee, believing there was a mistake, went to the telegraph office and asked the operator, as the plaintiff testified, to ask the sender which it was; to which the operator replied: “I have asked him; it is five six.” The operator testified that the addressee asked him if it was correct; that he went to his key and asked the transmitting operator if it was “six,” and received the reply that it was, which he told Mr. Landis.

The telegram meant that the sender had bought one car load of sheep at \$6.50 per hundred, and two cars of Texas long-wooled sheep at \$5.60 per hundred. As received he understood it to mean \$5.06 for the Texas sheep, and he sold them before they arrived at \$6.00.

The grounds of error assigned by the defendant below in addition to those sufficiently stated in the opinion, were the following:

4. Charging the jury as follows:

“The operator admits that they asked him to ask back, and he told them he had asked back. What more one who wants a message repeated can do is hard to understand. All you can ask is to have it repeated. A citizen can't know by what route his message was sent. The sender has no mode of compelling a repetition to originating office. If the receiver of the message asks to have it repeated, he is not bound to know how it is done. If he asked to have it repeated, that was all he is bound to do. The liability of defendant is complete. It is beyond dispute that plaintiff did ask to have the message repeated.”

5. Refusing to charge as follows:

“If the jury find that, at the request of one of the plaintiffs, the receiving operator asked back as to the correctness of the message, and asked only to the office from which he had received the message, and was assured that

the word in the copy of the message before the sending operator was 'six,' and that the operator so informed the plaintiff, and that the plaintiff paid nothing for this service, these facts do not amount to a repetition of the message provided for in the contract between the parties and the plaintiff." (6) Refusing to charge the jury as requested in the following point: "The plaintiff having sold sheep at a price above what he paid for them, he has suffered no loss, and can recover nothing from the defendant."

Rudolph M. Schick (*Benjamin Harris Brewster* with him), for plaintiff in error.

Samuel B. Huey (*Josiah R. Adams* with him), for defendant in error.

The COURT: We see no error in permitting the witness, Landis, to answer the question, "Did you sell the sheep at that price?" The sheep had been sold to arrive at six dollars per hundred. The allegation of the plaintiff was that they had been sold for less than their value by reason of the error in the telegram, and he claimed to recover the difference as the measure of damages. The defendant company could not have been injured by the reply of the witness.

The second assignment does not appear to be sustained by an exception, and is moreover without merit. Nor do we think it was error to refuse to permit the defendant to prove by the witness Shuster the practice or method pursued by the company in regard to repeated messages. What either party did or omitted to do upon this particular occasion was competent.

The fourth assignment alleges error in the charge of the court. A careful examination of the evidence leads us to a different conclusion. The message came from the stock yards near Pittsburgh to Philadelphia. When delivered at that place to the plaintiff he feared there was a mistake, and went at once to the office of the company and asked

the operator to wire back for information. The witness said: "I think I went right away to operator, and asked him to ask Erisman whether it was 'five six' or 'five sixty,' and he said, 'I have asked him.' The reason he had asked was, he thought it was funny it was 'five six.'"

This was substantially uncontradicted. The plaintiff could only understand from it that the operator had wired back to inquire if the message had been transmitted correctly. The fact that nothing was paid for this service is not important. Had there been a demand, and a refusal to pay, there would have been more force in the point. Aside from this, the plaintiffs had a current account with the company, and paid on bills rendered on stated occasions.

The fifth and last assignment relates to the measure of damages. The court was asked to say to the jury that, as the plaintiff had sold the sheep at more than cost, they sustained no damage. This the court declined to do, and in this we see no error. The plaintiffs were entitled to recover their actual loss. This is the rule recognized in our own case of *United States Telegraph Company v. Wenger*, 55 Penn. 262. In that case an order to purchase stocks was sent to a broker in New York. The message was never delivered, causing a delay in the purchase of the stock, which, in the mean time, had advanced in price. The plaintiff was allowed to recover the difference.

It was urged by the plaintiff in error that the telegram did not disclose its meaning so as to enable the operator to understand the importance of its correct transmission, and that the company could not have been aware of the extent of their responsibility for an error. *Telegraph Company v. Wenger* was cited to sustain this view. That, however, was a case where the negligence was a failure to deliver the telegram. Some of the other cases cited were also for delay in delivery. It seems reasonable that, where damages are claimed for mere delay in delivery, the face of the telegram ought to contain something to put the company upon its guard. A delay of a day, or even a few hours, might cause a heavy loss. But the case in hand is one of

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erroneous transmission, and the loss was by reason of such error. The plaintiffs were receiving daily, and sometimes several times daily, telegrams of a similar character regarding stock. There was enough upon its face to indicate to the operator that it referred to sheep to be shipped to Philadelphia, and their price.

Judgment affirmed.

Opinion by PAXON, J.; TRUNKEY, J., absent.

NOTE.— See INDEX to this and to previous volume, titles “ Limiting Liability ; ” “ Damages. ”

In addition to this and the preceding case, see the following cases in vol. 1, upon the liabilities of telegraph companies, decided in Pennsylvania: *Harris v. W. U. Tel. Co.*, p. 87; *Passmore v. W. U. Tel. Co.*, p. 168.

THOMAS D. MARR V. WESTERN UNION TELEGRAPH COMPANY.

Supreme Court of Tennessee, March 8, 1887.

(85 Tenn. 529.)

DUTY OF TELEGRAPH COMPANIES.— LIMITING LIABILITY.— NIGHT MESSAGE.— DAMAGES.

While a telegraph company is not, like a common carrier of goods, liable as an insurer, its duties are in many respects similar to those of a common carrier; and among those duties, prescribed by statute in Tennessee, is the duty to transmit messages *correctly*.

A stipulation in a telegraph blank, limiting the liability of the company for damages “ from whatever cause occurring, ” is invalid in so far as it purports to relieve the company from liability for its own negligence.

The substitution of the word “ hundred ” for “ thousand ” in the transmission of a telegram along a single line, of which the instruments and wires are in proper condition, is *prima facie* evidence of negligence.

In case of loss caused by advance of values of stocks during the period of delay of a telegram, the measure of damages is the amount of such rise; but plaintiff cannot recover the amount of rise after delivery, the loss being then due to his own act or failure to act.

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Cases of this series cited in opinion : *W. U. Tel. Co. v. Blanchard*, vol. 1, p. 404 ; *Manville v. W. U. Tel. Co.*, vol. 1, p. 92 ; *Tyler v. W. U. Tel. Co.*, vol. 1, p. 14 ; *Passmore v. W. U. Tel. Co.*, vol. 1, p. 168 ; *Candee v. W. U. Tel. Co.*, vol. 1, p. 99 ; *Grinnell v. W. U. Tel. Co.*, vol. 1, p. 70 ; *W. U. Tel. Co. v. Cohen*, vol. 1, p. 670 ; *W. U. Tel. Co. v. Brown*, vol. 1, p. 461 ; *Bartlett v. W. U. Tel. Co.*, vol. 1, p. 45 ; *W. U. Tel. Co. v. Fontaine*, vol. 1, p. 229 ; *Hibbard v. W. U. Tel. Co.*, vol. 1, p. 62.

APPEAL from Circuit Court, Davidson county.
Action for damages. Facts stated in opinion.

F. C. Maury, for Marr.

J. C. Bonner, for telegraph company.

LURTON, J.: The plaintiff, a banker and broker doing business in Nashville, delivered to the agent of the defendant company a message to be transmitted to Messrs. Pearl & Co., New York. This message was written upon the usual form or blank prepared for that purpose by the defendant, and known as a night message. As delivered, it was as follows :

“ Form No. 45.

“ THE WESTERN UNION TELEGRAPH COMPANY.

“ NIGHT MESSAGE.

“ The business of telegraphing is subject to errors and delays, arising from causes which cannot at all times be guarded against, including sometimes negligence of servants and agents whom it is necessary to employ. Errors and delays may be prevented by repetition, for which, during the day, half-price extra is charged in addition to the full tariff rates.

“ The Western Union Telegraph Company will receive messages, to be sent without repetition during the night, for delivery not earlier than the morning of the next ensuing business day, at reduced rates, but in no case for less than twenty-five cents tolls for a single message, and upon the express condition that the sender will agree that he will not claim damages for errors or delays or for non-delivery of such messages happening from any cause, beyond a sum equal to ten times the amount paid for transmission, and that no claim for damages shall be valid unless presented in writing within thirty days after sending the message.

“ Messages will be delivered free within the established free-delivery limits of the terminal office. For delivery at a greater distance a special charge will be made to cover the cost of such delivery, the sender hereby guaranteeing payment thereof.

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"The company will be responsible to the limit of its lines only for messages destined beyond, but will act as the sender's agent to deliver the message to connecting companies or carriers if desired, without charge and without liability.

"THOS. T. ECKERT, *General Manager.* NORVIN GREEN, *President.*

Receiver's No.	Time Filed.	Check.
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"Send the following night message subject to the above terms, which are hereby agreed to :

_____, 188—,

"To Pearl & Co., Bankers, 16 Broad St., New York: Buy one thousand shares Memphis & Charleston. THOS. S. MARR.

"~~13~~ Read the notice and agreement at the top."

This message, as received, read as follows: "*Buy one hundred shares of Memphis & Charleston.*" This number of the desired shares, they being, as the proof shows, of the par value of \$25 each, were purchased at 62 cents upon the dollar. The market rose rapidly on the day of this purchase, and closed at about 67, and remained at about that figure the day following. From that time it steadily advanced, until within three weeks it had reached the price of about 90 cents. The plaintiff was not advised of the error in his message until the day following the purchase of the 100 shares, but he did not renew his order for several days, by which time the stock had made a further advance, so that the stock actually cost him about \$3,000 more than it would have cost him but for the error in his message.

Plaintiff instituted suit in the Circuit Court to recover damages upon the ground of the negligence of the defendant in the transmission of his message.

The cause was tried by the circuit judge without a jury, who found that the mistake was due to the negligence of the agent of the defendant at the receiving office in Nashville, but that, under the printed regulations of the company contained on the blank used by plaintiff, he was limited in his recovery of damages to a sum not exceeding 10 times the price paid for transmission, which was 30 cents; and he accordingly gave judgment for only \$3. From this there is an appeal.

The commission of referees report that the stipulations or agreement contained in the printed blank are invalid in so far as they limit the recovery of plaintiff for damages resulting from the negligence of the defendant or its servants. They therefore recommend judgment here for the difference between the market value of 900 shares on the day the message was received and its value on the next day. Exceptions open the case for our consideration.

The evidence shows that this message was written plainly and distinctly. The blunder was undoubtedly the result of the careless and negligent misreading of the dispatch by the operator whose duty it was to transmit this message from the receiving office. The line between Nashville and Cincinnati, the point to which it was sent to be repeated to New York, was a continuous one. The instruments in use at both offices are shown to have been in good repair, and the line uninterrupted. No atmospheric or other electrical disturbance is attempted to be shown as having affected the correct transmission of the message if it had been correctly started. Yet this message reached Cincinnati as, "buy *one hundred* shares," etc. The word "*thousand*" had been converted into "*hundred*." No effort to account for this has been made. It is clear, in such case, that this blunder was made by the transmitting operator at the receiving office. The message was either wilfully missent, or was the result of the negligent misreading of the operator. If started right, it is not pretended that it would not have reached the repeating office correctly. At least no effort has been made to account for such a noticeable change of one word into another so entirely different, over a continuous line of wire, when the instruments and wire were in repair, and efficient, by any cause not within the control of the defendant.

The trial judge and the commission of referees concur in finding that the mistake was due to negligence of the transmitting operator at Nashville. In this finding we have no doubt they were correct.

What damage shall the plaintiff recover? The defend-

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ant company insist that the stipulation upon the face of the blank form used and signed by the plaintiff, "that the sender will not claim damages for errors or delays or non-delivery of such message, *happening from any cause*, beyond a sum equal to ten times the amount paid for transmission," is a reasonable and binding agreement, by which the recovery is limited even where the damage was the result of negligence. It must be assumed that the plaintiff knew of the terms and conditions contained upon the printed blank on which he wrote his message. His denial of actual knowledge cannot avail him, for it was his own fault if he is ignorant. He is estopped to say that he was not aware of the agreement and regulations on the blank signed and used by him. *Dillard v. Louisville & Nashville Railroad Co.*, 2 Lea, 288.

Assuming, therefore, that the plaintiff assented to the conditions contained in the agreement under which this message was sent, we reach the question as to the validity of any agreement by which the defendant company seeks to relive itself from full liability for all the consequences of its own negligence, or that of its agents and servants. The question presented is of the greatest importance, and in this State is wholly undecided. We have had the benefit of very full and very able arguments from the opposing counsel, and their industry and learning have been of the greatest aid to us in arriving at a conclusion. The science of telegraphy is of such recent discovery that the courts have had some difficulty in settling upon the principle of law applicable to the relations of telegraph companies to the public. Some of the earliest cases held that they were common carriers, and that the principle of law applicable to such carriers applied equally to them; or, at least, if not strictly common carriers, that they were governed by the same law. *MacAndrew v. Electric Telegraph Co.*, 17 C. B. 3; *Parks v. Alta California Telegraph Co.*, 13 Cal. 422.

Common carriers, by the common law, were held liable, not only for losses occurring through their negligence, but

for loss occurring through any cause other than from the act of God or the public enemy. This extraordinary degree of responsibility, making them liable as insurers, was founded upon public policy. Their existence was of the utmost importance to the public; and, when once established, the employment of them by the general public was deemed a necessity. The unlimited opportunities offered them, by their exclusive possession of freight, by negligence or collusion or fraud to damage, delay, or rob, with practical immunity from detection, is stated to be the reason why consideration of public policy demanded so high a degree of liability. These reasons do not exist in regard to telegraph companies. They are not in any sense carriers of goods. They do not, therefore, have any exclusive possession of goods, and the reasons which make a carrier an insurer of the safe delivery of goods intrusted to him are manifestly not applicable to one whose business is to transmit, by means of electricity, intelligence, and not goods. It is therefore well settled that they are not common carriers, by the almost unbroken current of authority. It can hardly be said that they are bailees in any true sense, inasmuch as they are not intrusted with goods for any purpose, either carriage, use, or repair. They have been called common carriers of messages or intelligence; but this, while appropriately designating both their public character and the business they undertake, does not necessarily bring them within the law applicable to a carrier of goods.

There is, however, much analogy between the common carrier and the telegraph company. Both are in the exercise of a *quasi* public occupation, and both have by the public conferred upon them valuable franchises, and both may and do invoke the high prerogative of exercising the State's right of eminent domain. The obligation to serve the public without discrimination, and for reasonable charges, is imposed upon both occupations. The use of the facilities afforded by telegraph companies has become as much of a public necessity as were common carriers at the same relative stage of development. It may, indeed,

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be said that, both commercially and socially, the telegraph line is now a public necessity. By statute law in this State, the public nature of the occupation of telegraph companies is fully recognized. They are given the right to set up their lines along the public roads and streets. They may appropriate private property to their use by the exercise of the right of eminent domain upon the terms of the statute. They are required to give preference to public messages in time of war or civil commotion, or when the arrest of criminals is sought. They are required to transmit messages in the order of their delivery, *correctly*, and without unreasonable delay. They are required to receive and transmit messages from other telegraph companies. The wilful injury of their lines is made a misdemeanor. Their occupation is therefore, in every sense, deemed as much of a public character as that of the common carrier. Code (M. & V.), §§ 1535-1548.

In view, therefore, of the great importance their business is to the public, and the necessity the public is under of employing them, it is clear that they must be held to a degree of diligence commensurate with the employment they have undertaken. We do not think, in view of the novel and peculiar character of the business conducted by them, that they can or ought to be held liable as insurers. It is, however, equally clear that considerations of public policy demand that they shall be held responsible for a very high degree of diligence. In this State it has been held that a common carrier may, by special contract, based on a sufficient consideration, limit his *common-law* liability, but that he can not stipulate for exemption for the consequences of *his own negligence, or that of his servants*. *Dillard Bros. v. Louisville & Nashville Railroad Co.*, 2 Lea, 288; *Coward v. East Tennessee, Virginia and Georgia Railroad*, 16 Lea, 224.

This inability to contract against his own negligence is based upon the ground that "he exercises a public employment, and that diligence and good faith in the discharge of his duties are essential to the public interest, and public

policy forbids that he should be relieved by special agreement from that degree of fidelity and diligence which the law has exacted in the discharge of his duties." *Coward v. East Tennessee, Virginia and Georgia Railroad*, 16 Lea, 229.

The same reasons which make void the contracts of a common carrier by which he seeks to be wholly exempt from the consequences of his own negligence, or that of his servants, apply with equal force to similar agreements, contracts, or stipulations or rules or notices, by which a telegraph company seeks immunity from all responsibility for its negligence. The great weight of the decided cases clearly establishes this proposition. *Sweatland v. Illinois & Mississippi Telegraph Company*, 27 Iowa, 432; *Telegraph Company v. Griswold*, 37 Ohio St. 301; *Manville v. Telegraph Company*, 37 Iowa, 214; *Graham v. Telegraph Company*, 1 Cal. 230; *Blanchard v. Telegraph Company*, 68 Ga. 299; *Tyler v. Telegraph Company*, 60 Ill. 421, 74 Ill. 168; *U. S. Telegraph Company v. Wenger*, 55 Penn. St. 262; *True v. Telegraph Company*, 60 Me. 9; *Passmore v. Telegraph Company*, 78 Pa. St. 238; *Candee v. Telegraph Company*, 34 Wis. 471.

But it is insisted that if it be conceded that a telegraph company can not by contract *exempt* itself *absolutely* from *all* liability for negligence, yet that it may, for a sufficient consideration, limit its liability to a certain pecuniary amount, where various grades of liability are offered, including full responsibility, and at various rates of charge. In the case now under consideration the defendant company offer in evidence the terms and conditions upon which they send messages other than the half-rate night message. These stipulations are contained upon the usual blanks furnished for day messages, and are as follows:

" Form No. 2.

" THE WESTERN UNION TELEGRAPH COMPANY.

" All messages taken by this company are subject to the following terms:

" To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison.

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For this one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, whether happening by negligence of its servants, or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated message, beyond fifty times the sum received for sending the same, unless especially insured; nor in any case, for delays arising from any unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

"Correctness in the transmission of messages to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz.: One per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employé of the company is authorized to vary the foregoing.

"No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender.

"Messages will be delivered free within the established free-delivery limits of the terminal office. For delivery at a greater distance a special charge will be made, to cover the cost of such delivery.

"The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message.

"THOS. T. ECKERT, *General Manager.* NORVIN GREEN, *President.*

Receiver's No.	Time Filed.	Check.
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"Send the following message, subject to the above terms, which are hereby agreed to :

_____, 188—."

If it be assumed that the plaintiff in this case was offered a choice of terms upon which he might send his message, and that he selected the night message contract by preference, we are then called upon to determine whether the regulations, rules, and stipulations under which the company propose to do business for the public are just and reasonable limitations upon the responsibility imposed upon them in the absence of agreements and contracts. The

courts of many of the States of this Union have held that a common carrier cannot, by any description of contract, rule, or regulation, limit his responsibility for full damages resulting from his own negligence, or that of his servants or agents. *Southern Express Company v. Moon*, 39 Miss. 822; *United States Express Company v. Backman*, 28 Ohio St. 144; *Black v. Goodrich Transfer Company*, 55 Wis. 319; *Chicago, St. Louis & New Orleans Railroad Company v. Ables*, 60 Miss. 1017; *Kansas City Railroad Company v. Simpson*, 30 Kan. 645; *Moulton v. St. Paul Railroad Company*, 31 Minn. 85. And this is probably the law as settled in this State. *Coward v. East Tennessee, Virginia and Georgia Railroad Company*, 16 Lea, 226.

But, on the other hand, many very respectable courts, including the Supreme Court of the United States, have held that "where a contract of carriage is fairly made with a railroad company, agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." *Hart v. Pennsylvania Railroad Company*, 112 U. S. 331.

In the latter case the court say that the test to which every limitation of the common-law liability of the carrier should be subjected is "*its just and reasonable character.*"

If it be assumed, for we do not determine this question, that a telegraph company may by fair, just and reasonable regulations, limit the amount of damages to which it may be subjected by reason of negligence, then will the terms and conditions upon which this company propose to conduct its business stand the test of justness and reasonableness. It must at the outset be conceded that a telegraph company, like a common carrier, must offer to do the busi-

ness of the public subject to ordinary liability for negligence, upon terms fair and reasonable; and that if it does not do this, it does not offer a choice of terms, and cannot escape full responsibility, even upon the view of the law contained in the case of *Hart v. Pennsylvania Railroad Company*.

Now, upon an examination and analysis of the terms contained in both the day and night message blanks of the defendant company, we find:

First. That, in the usual day-message contract, they stipulate for immunity from all damages for error or delay in an unrepeated message beyond the price paid for the transmission of the message.

Second. If the message be repeated, they contract against liability beyond 50 times the toll paid.

Third. They offer to insure the correctness of transmission, except errors in cipher or obscure messages, and damage from unavoidable interruption of lines upon payment of price of a repeated day message, and a premium of 1 per cent. on an agreed amount of risk if under 1,000 miles, and 2 per cent. if over this; but such insurance must be by a contract in writing.

Fourth. They offer to send unrepeated messages at night for delivery next business day, at half usual day rate, on condition that they shall not be responsible for damages for a sum in excess of 10 times the cost of transmission.

Now, to send the message the plaintiff desired to send, as a night message, he was required to pay 30 cents. But the defendant contracted against responsibility even for its own negligence beyond the sum of three dollars. Looking alone at the printed notices and rules, no proposition is made for repeating such a message. But the agent says that it would have been repeated if he had desired. Of this Marr had no notice whatever. On the contrary, the printed rules and regulations clearly imply that a night message will not be repeated. If he had, instead of sending a night message, sent an ordinary day message, without repeating, then the toll would have been 60 cents; but to do this he is forced to assent that he shall not be allowed damages

for errors committed through even the negligence of the company, a sum in excess of 60 cents—the price of transmission. If he has the message repeated, and pays for this 30 cents more, the defendant still requires that he shall agree to release them from all liability beyond 50 times the toll paid, a sum in itself trivial compared with the injury really sustained by him in this instance.

If he make what defendants call a contract of insurance, he must, in addition to the price of the repeated message—90 cents—pay a premium of 1 per cent. upon an agreed amount of risk. The real consequences of an error in sending a commercial dispatch of the character of the one in question would be difficult to estimate in advance. But, if an estimate in accord with the very least damage that did in fact occur had been fixed, he would then have had to pay, in addition to the 90 cents, a premium of not less than \$11. If he pays even this exorbitant sum—\$11.90—he then obtains for that nothing more than an agreement that the company will be responsible for its own acts of negligence to the extent of the agreed amount of risk. The exceptions out of the so-called contract of insurance leave, in substance, nothing more than the liability imposed by law for negligence, in the absence of any limitation by agreement.

Now, when we consider that the business of telegraphy is practically a monopoly, and that there is in fact no real competition for the business of the public, and the other fact, that the use of the facilities afforded by such companies has become a matter of social and commercial necessity, we can readily see that the public are under a species of coercion to assent to whatever conditions such companies choose to impose. Practically the scale or graded charges offered by this company afford no real choice of terms. The price at which they propose to send messages subject to ordinary legal liability—the insurance proposition—is so grossly in excess of the cost of service, when compared to the terms offered for service without such liability that we do not hesitate to say that the conditions limiting the

liability of this company for negligence, are not fair, just or reasonable and are void as against public policy. They constitute, taken together, but an artful arrangement and device by which the consequences of their own negligence is thrown upon the shoulders of their customers, and they are enabled to conduct business with no responsibility, beyond that of the most trivial character, for their own want of due care. The terms upon which they do assume full liability are so arranged, and so exorbitant as probably never to be called into use. We do not mean to decide that it is not in the power of such a company to graduate their charges in some sort of proportion to the responsibility and risk incurred. We are not insensible to the fact that public policy as much demands that liberty of contract shall be preserved as that unjust and unreasonable limitations shall be held void. But we do hold that, under the printed notices, regulations and stipulations of this defendant, it did not propose to do the business of the public upon the terms imposed by law,— of responsibility for its own negligence or that of its servants — for a reasonable and just compensation, and that, therefore, these limitations contained in the agreement under which the message was sent, under any view of the power of the company to limit its liability for its own negligence, were invalid, in so far as the damage was a result of the negligence of the defendant or its servants.

In reaching this conclusion we have given due consideration to the opinions of the courts of last resort in other States. We have found much conflict upon some of the questions involved in suits of this character, but we have examined all the leading reported cases, and we can, in main, concur in the statement of Judge DILLON, who said : “ We have examined all the leading cases known to have been decided in respect to this subject [exemption from liability for negligence], and have not found one holding, when this subject was the exact point in judgment, that the ordinary printed conditions as to repeating messages have the effect to release the company from mistakes caused by its own want of ordinary care.” *Sweatland v. Illinois &*

Mississippi Telegraph Company, 27 Iowa, 432.

The case of *Grinnell v. W. U. Tel. Company*, 113 Mass. 299, is a case decided since the opinion of Judge DILLON, and is not, of course, included in his criticism.

The *MacAndrew* case, cited as an authority for the proposition that a telegraph company may contract against its own negligence, and so cited in many subsequent cases, can hardly be regarded as an authority; for it was an English case, and is based upon the English doctrine that a common carrier may contract against his own negligence,—a doctrine nowhere sustained in this country, except perhaps the State of New York. *MacAndrew v. Electric Tel. Co.*, 17 C. B. 3.

The case of *W. U. Telegraph Co. v. Carew*, 15 Mich. 525, was a case involving no negligence of the company sued. The error occurred on the line of a connecting but independent company, and the court held that the stipulation that the receiving company should not be responsible for mistakes committed upon other lines was reasonable and valid.

The case of *Ellis v. Telegraph Company*, 13 Allen (Mass.), 226, did not involve the fact of negligence; for the court held that no negligence was proven.

The case of *Camp v. W. U. Telegraph Company*, 1 Metc. (Ky.) 164, was a suit upon the contract to transmit as contained in the agreement under which the message was sent. The petition did not charge negligence, and consequently the case is not an authority for the proposition that they may contract against negligence.

The conclusions which we have reached as to the effect of stipulations contracting against negligence has the support of text writers of eminence and ability. The distinguished Judge REDFIELD, in commenting on the *MacAndrew* case, before cited, says in this case:

“A query is made how far the company in such case [exempting itself from liability unless message is repeated] will be responsible for gross negligence. We think there ought to be no doubt in regard to the responsibility of the company in such cases for even ordinary negligence, and

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the whole extent to which such a condition should be held to qualify the responsibility of the company is that it will not be held absolutely responsible as an insurer of the accuracy of transmitting messages unless repeated and paid for as such." 2 Red. Railways (3d. ed.), 244.

He repeats the same views in his work on Carriers, sections 552, 561.

Gray on Telegraphic Communications, a work wholly devoted to the questions concerning telegraphic companies, throws the weight of his opinion against the validity of contracts to any extent limiting liability for negligence as contrary to public policy. Sections 50-52, and authorities cited.

We recognize the full force of the reasoning, as well as of the great reputation, of the judge deciding the case of *Grinnell v. W. U. Telegraph Company*, 113 Mass. 299, but we can not concur with him that these agreements are valid as relieving the company from ordinary negligence. He, however, does not hesitate to doubt whether they could be held as releasing the company from gross negligence or bad faith. This admission is noticeable; for it may well be doubted whether the absence of due care would not be gross negligence. We have already cited, in the earlier part of this opinion, many authorities which, to a large degree, support the conclusions we have reached. In addition to those already cited we may refer to the following: *Telegraph Company v. Cohen*, 73 Ga. 522; *Dryburg v. Telegraph Company*, 35 Penn. State, 298; *Telegraph Company v. Brown*, 58 Tex. 170; *Bartlett v. Telegraph Company*, 62 Me. 209; *Telegraph Company v. Fontaine*, 58 Ga. 433; *Hibbard v. Telegraph Company*, 33 Wis. 558.

The damages assessed by the commission of referees is upon the correct basis. The loss resulting from change in market value was clearly the natural result of the telegraph operator's mistake. Being the natural result of the negligence of the defendant, the law adjudges that it was within the contemplation of the parties. This message was so written that the slightest reflection would enable the

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operator who undertook its transmission to see its commercial importance, and to put him on his guard against error.

The proof shows, however, that if the plaintiff, so soon as he was advised of the miscarriage of his message, and that but 100 shares of the stock he desired had been bought, instead of 1,000, that he could by prompt action have caused the additional 900 to have been purchased at sixty-seven cents on the par dollar, instead of sixty-two, at which his order could have been filled but for the error. He did not take steps to have this stock bought until the stock had made a much greater advance.

We are of opinion that for the advance occurring after he could have remedied the mistake that he cannot hold the defendant responsible. The law imposes upon a party subjected to injury by the action of another the active duty of making reasonable exertions to render the injury as light as possible. Where the injury results from breach of contract or unintentional negligence, this obligation to reduce the consequence of the injury by reasonable diligence is positively imposed by every consideration of public interest and sound morality; "and if the injured party, through negligence or wilfulness, allows the damage to be unnecessarily enhanced, the increased loss falls justly on him." *Leonard v. New York Telegraph Company*, 41 N. Y. 544; *Rittenhouse v. Telegraph Company*, 44 N. Y. 263.

Rendering such judgment as the circuit judge should have rendered, we direct judgment to be here entered for \$1,125, with interest, and for all the costs of the cause. The report of the commission of referees is accordingly confirmed.

NOTE.—This case is cited in the following cases in this volume: *Wadsworth v. W. U. Tel. Co.*; *W. U. Tel. Co. v. Memford*; *W. U. Tel. Co. v. Reid*; *Gillis v. W. U. Tel. Co.*

See INDEX to this and to previous volume, titles "Duty to Customers," "Limiting Liability," "Damages."

See notes, vol. 1, pp. 79, 99: vol. 2, pp. 616, 654.

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JENNIE H. WADSWORTH ET AL. v. WESTERN UNION
TELEGRAPH COMPANY.

Tennessee Supreme Court, May 29, 1888.

(86 Tenn. 695.)

DEFAULT OF TELEGRAPH COMPANY.—TENNESSEE STATUTE.—DAMAGES —
RIGHT OF ADDRESSEE.

Under a statute imposing upon telegraph companies the duty to transmit dispatches "in the order of delivery, correctly and without unreasonable delay," and making its violation a misdemeanor; also making the company "liable in damages to the party aggrieved," held,

That in case of violation of the statute, the remedy is not confined to the sender of the dispatch, but avails the addressee suffering injury.

That mental suffering is a proper element of damage, even if unaccompanied by any other injury or loss to the plaintiff, except the price of transmission which she paid.

Cases of this series cited in opinion: *Marr v. W. U. Tel. Co.*, ante, p. 720; *W. U. Tel. Co. v. Fatman*, vol. 1, p. 666; *W. U. Tel. Co. v. Reynolds*, vol. 1, p. 487; *So Relle v. W. U. Tel. Co.*, vol. 1, p. 348; *Gulf, &c. Ry. Co. v. I. Levy*, vol. 1, p. 538; *Gulf, &c. Ry. Co. v. J. T. Levy*, vol. 1, p. 543; *Stuart v. W. U. Tel. Co.*, post.

ACTION for damages for delay of telegrams.

Appeal by plaintiff from judgment of Circuit Court, Shelby county, sustaining demurrer to the declaration.

John D. Martin, for Wadsworth.

Turley & Wright, for telegraph company.

CALDWELL, J.: This suit was brought in the Circuit Court at Memphis, by Mrs. Jennie H. Wadsworth and her husband, T. J. Wadsworth, against the Western Union Telegraph Company, for failing to promptly deliver to her the following telegraphic messages:

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“ MEMPHIS, October 2, 1887.

“ *To Mrs. T. J. Wadsworth, Byhalia, Miss.* : Your brother, Billie Howell, is in a dying condition at 105 Jefferson St. R. C. WALDEN.”

And :

“ MEMPHIS, October 8, 1887.

“ *To Mrs. T. J. Wadsworth, Byhalia, Miss.* : Mr. Howell died this morning. Advise us what to do. Will look for some one on morning train. R. C. WALDEN.”

It is averred in the declaration that Byhalia is about 28 miles from Memphis, and that the two places are connected by direct line of telegraphic wire and railroad ; that Billie Howell, a brother of Mrs. Wadsworth, one of the plaintiffs, was “seized with a mortal malady,” in the city of Memphis, on the 2nd day of October, 1887, and that, at about the hour of 7 o'clock P. M. of that day, R. C. Walden, “a friend of the family,” presented to the defendant the former of the messages just set out, written upon one of its day or full-rate blanks, and that it was accepted by the defendant for immediate transmission and delivery to her ; that through the gross, wanton and reckless negligence of the defendant, and in palpable violation of its duty, the message was by the defendant detained, and not delivered until about 11.30 A. M. of the next day, and several hours after the death of Howell ; that he died about 6.30 o'clock A. M. on the 3rd of October, 1887, and a few moments thereafter the second of said telegrams was presented and accepted for immediate transmission and delivery, as was the other one, and that, through the same gross, wanton, and reckless negligence of the defendant, this second message was detained, and not delivered by the defendant, until about the same time the other one was delivered ; that, by reason of this negligence and breach of duty on the part of the defendant, Mrs. Wadsworth was prevented from attending her dying brother and ministering to him in his last hours, and also from making desired preparations for his interment ; that the messages were sent

at her expense; and that she paid full toll therefor,—“to her damage ten thousand dollars.”

Demurrer was sustained, and the suit dismissed. Plaintiffs have appealed in error.

The first assignment of demurrer is that the declaration shows no cause of action, in that it avers no pecuniary damage or personal injury; that mental suffering, unaccompanied by pecuniary injury, will not sustain an action.

Clearly, the declaration discloses a case for some damage; and to this extent, it must be conceded, the action in sustaining the demurrer was erroneous.

The messages in question were couched in decent language, and were lawful in their purpose. Such being true, Walden had a legal right to send them, and Mrs. Wadsworth had a legal right to receive them; and it was the plain duty of the defendant to deliver them promptly. Its dereliction of duty, and violation of her legal right, as averred in the declaration, and confessed in the demurrer, unquestionably gave her a right of action. “Every infraction of a legal right, in contemplation of law, causes injury. This is practically and legally an incontrovertible proposition. If the infraction is established, the conclusion of damages inevitably follows.” 1 Suth. on Damages, p. 2.

But the question most debated at the bar by learned counsel, and the one of most importance and interest in this case, is whether or not injury to the feelings, anguish, and pain of mind, occasioned by the defendant's breach of duty to Mrs. Wadsworth, can be regarded as an element of damage under the law. In actions for personal injury, the general rule—which is too familiar to admit of citations of authority to sustain it—is that both bodily pain, and mental suffering connected therewith, are to be considered by the jury in estimating the amount of damage sustained, and the sum to be recovered by the plaintiff. Upon the latter element, it is very truthfully and appropriately remarked by a learned author that “the mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter.

Indeed, the sufferings of each frequently, if not usually, act reciprocally on the other." 3 Suth. on Damages, 260.

After laying down the rule as we have stated it to be, and citing some of the very many decisions adopting it, Mr. Wood says:

"But we do not apprehend that the rule has any such force as to enable a person to maintain an action where the only injury is mental suffering, as might be thought from a reading of the loose *dicta* and statements of the court in some of the cases. So far as I have been able to ascertain the force of the rule, *the mental suffering referred to is that which grows out of the sense of peril or the mental agony at the time of the happening of the accident, and that which is incident to and blended with the bodily pain incident to the injury, and the apprehension and anxiety thereby induced.*" Wood's Mayne on Damages, p. 74, note.

On the same subject Mr. Cooley says:

"But in this country, as well as in England, the ground of the recovery must be something besides an injury to the feelings and affections, or a loss of the pleasure and comfort of the society of the person killed; there must be a loss to the claimant that is capable of being measured by a pecuniary standard." Cooley on Torts, 271.

These are the strongest statements of the rule contended for by the defendant which we have seen, and to them we give our full approval when applied to the class of cases with respect to which they are made. But they are applicable peculiarly, not to say exclusively, to actions for injury to the person where physical injury is the sole ground of action, and without which the action will not lie at all.

This, however, is an action, on the facts of the case, which is permissible under our Code, and may include all matters embraced in an action *ex delicto*, and also those proper to be considered in an action *ex contractu*.

The plaintiff, having a clear right of action for *some* damage, as we have already seen, may maintain her action,

and recover *all* the damage she may show herself to have sustained by reason of the wrongful act of the defendant; and, in ascertaining the amount thereof, all proven elements of damage, admissible in either form of action, are for the consideration of the jury.

In an action for tort the injured party may recover such damages as result proximately and naturally from the wrongful act of the defendant, and also exemplary damages where the act was done with malice, or under circumstances of aggravation; and, in an action for a breach of contract, the measure of the damages recoverable is, generally, the loss which the contracting parties, with all the facts before them, would have contemplated as flowing directly from its breach. 2 Thomp. on Neg. p. 849; Gray's Com. by Tel. 146.

The latter author, on the next page, says: "Neither in an action of tort nor in one of contract can a party recover damages for mental anguish alone; he can recover such damages, in consonance with the foregoing rules *at least, only where he is entitled to recover some damage on another ground.*

There is a large class of actions for tort in which substantial recoveries are authorized and sustained for injury to the feelings of the person suing, where the other damage is nominal merely. As instances of such actions, we mention the case of a husband suing for an injury to his wife, or for seducing or enticing her away from him, and that of a parent suing for the seduction of a daughter. In all these cases, the main element of damage, the real injury sustained, is the wound to the feelings—the loss of service upon which the actions are technically based being but a legal fiction, and more imaginary than real. *Love v. Masoner*, 6 Bax. 27; *Parker v. Meek*, 3 Sneed, 30; *Magginoy v. Soudek*, 5 Sneed, 147; Cooley on Torts, 224, 226, 231; 3 Suth. on Dam. 744.

With respect to actions for breach of contract, Mr. Sutherland asks the question: "May damages for breach of contract include other than pecuniary elements?" and then he proceeds to say: "In actions upon contract, the losses sustained do not, by reason of the nature of the trans-

actions which they involve, embrace, ordinarily, any other than pecuniary elements. There is, however, no reason why other natural and direct injuries might not justify and require compensation. Contracts are not often made for a purpose, the defeating or impairing of which can, in a legal sense, inflict a direct and natural injury to the feelings of the injured party. A breach of promise of marriage is an instance of such a contract, and such considerations enter into the estimate of the damages. The action for such a cause is often referred to as an exceptional action. In a certain sense it is so ; but in the particular action under consideration it is only peculiar. It is an action upon contract, and the damages allowed are such as, considering the nature and benefits of the thing promised, will be adequate compensation." 1 Suth. on Dam. 156, 157.

To further illustrate and answer his question, the same author says: * * * "Where a contract is made to secure exemption from a particular inconvenience or annoyance, or to confer a particular enjoyment, the breach, so far as it disappoints in respect to that purpose, may give a right to damages appropriate to the objects of the contract." Ib. 157-8.

These are but illustrations and application of the general rule which we have already stated for the estimation of damages in actions for breach of contract. They serve the purpose of showing that, in the ordinary contract, only pecuniary benefits are contemplated by the contracting parties ; and that, therefore, the damages resulting from the breach of such a contract must be measured by pecuniary standards ; and that, where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied in the ascertainment of the damages flowing from the breach.

The case before us (so far as it is an action for breach of contract) is subject to the same general rule ; and the defendant is answerable in damages for the breach according to the nature of the contract, and the character and extent

of the injury suffered by reason of its non-performance.

The messages were sent for a particular purpose, which was disclosed upon their faces and of which the defendant had full notice. That purpose was not of a pecuniary nature. There was no offer or instruction to buy or sell any thing—no proposition or promise with respect to any business transaction.

The messages were of far greater importance to the receiver than any of these. Her brother was lying at the point of death, in easy reach of her. It was information of this fact that the defendant first undertook to convey to her for a stipulated sum, and which, if conveyed promptly, would have enabled her to be with him in his last moments, and would have saved her the injury of which she complains.

Then her brother died away from her; his body needed her attention, and would have received it, as averred, if the defendant had done its duty. It was intelligence of the death which the defendant agreed, in the second place, to communicate to her.

The messages were proper in language, and lawful in purpose. She was entitled to the information they contained, and to whatever benefits that information would have conferred upon her, even though such benefits be mainly or altogether to the feelings and affections. The defendant contracted that she should have those benefits, and that she should be spared whatever pain and anguish such information, promptly conveyed, would prevent.

By all the authorities, including our Code, it was the duty of the defendant to transmit and deliver these messages "correctly and without unreasonable delay;" and in failing to do so, it became responsible for all loss or injury occasioned thereby. Code (M. & V.), §§ 1541, 1542; *Marr v. Telegraph Co.*, 1 Pickle, 529; Gray's Com. by Tel. §§ 81, 82, *et seq.*: Cooley on Torts, 646-7; Whart. on Neg. § 767; 3 Suth. on Dam. 298-300; Shear. & Red. on Neg. § 605.

This rule of damages is enforced by the Supreme Courts

of Georgia, Virginia, and other States, even where the message is in cipher. *W. U. Tel. Co. v. Fatman*, 73 Ga. 285 (54 Am. Rep. 877) ; *W. U. Tel. Co. v. Reynolds*, 77 Va. 173 (46 Am. Rep. 715), and Reporter's note at the end of case.

It is true that most of the adjudged cases in which telegraph companies have been required to respond in damages for their negligence have involved questions of pecuniary loss ; but we can not agree that, for that reason, the liability should attach and be enforced in such cases only.

Telegraphy is of comparatively recent origin, and the law concerning the duties and liabilities of telegraph companies has hardly passed its infancy, and can not be expected, at so early a day in its history, to be settled, even in its important parts, by a long line of concurring decisions.

In addition to this, it is but reasonable to presume that such a flagrant breach of plain obligation, with respect to matters so near the heart and so accustomed to the respect of all mankind, as is here averred, has but seldom occurred, and therefore has but seldom been brought to the attention of the courts of the country.

To hold that the defendant is not liable, in this case, for the wrong and injury done to the feelings and affections of Mrs. Wadsworth by its default, would be to disregard the purpose of the telegrams altogether, and to violate that rule of law which authorizes a recovery of damages appropriate to the objects of the contracts broken ; and, furthermore, such a holding would justify the conclusion that the defendant might with impunity have refused to receive and transmit such messages at all, and that it has the right in the future to do as it has done in this case, or, at least, that it cannot be required to respond in damages for doing so.

To such a result we think no court should submit. The telegraph company is the servant, rather than the master, of its patrons. It is their prerogative to determine what messages they will present ; and, so they are lawful, it is bound by law, upon payment of its toll, to transmit and deliver them correctly and promptly. It has no right to say what is important, and what is not ; what will be profitable to

the receiver, and what will not ; what has a pecuniary value, and what has not ; but its single and plain duty is to make the transmission and delivery with promptitude and accuracy. When that is done, its responsibility is ended. When it is omitted, through negligence, the company must answer for all injury resulting, whether to the feelings or to the purse, one or both, subject alone to the proviso that the injury be the natural and direct consequence of the negligent act.

Continuing the discussion, and as illustrative of his position as to the allowance or non-allowance of a recovery for injury to the feelings, Mr. Wood says that an action will not lie for "charging a lady with being a prostitute, or a gentleman with being a scoundrel, a blackleg, a cheat," etc., unless the charge be productive of some *special damages*, apart from mental anguish occasioned thereby. Wood's Mayne on Damages, 75.

This is conceded to be true at common law, because, as stated by the same author, such offenses are not by the common law crimes in the legal sense. But if, by statute, the making of such charges be rendered actionable *per se*, and the injured party in that way get a standing in court, a recovery may be had for all damages sustained, including mental suffering.

In this connection, and in addition to what has already been said with regard to the right of action growing out of the defendant's breach of duty, it is to be observed that we have a statute which expressly confers the right of action. Section 1541 of our Code requires telegraph companies to transmit and deliver *all* proper messages "correctly, and without unreasonable delay ;" and, for a failure to do so, the defaulting company is, by section 1542, declared to be "liable in damages to the party aggrieved."

The language of each section is general, broad and comprehensive. The act does not discriminate between messages appertaining to matters pecuniary merely, and those having reference to matters of a domestic nature, as are those now before us. On the contrary, all must be transmitted

and delivered alike. The obligation upon the company is the same in the one class of cases as in the other ; and, if default occur, the remedy is the same for one person that it is for another person.

There is no discrimination with respect to the nature of the messages to be conveyed, nor is there any discrimination with respect to the nature of the damages to be recovered for the company's default. One section imposes a general duty, and the other gives a universal right of action for the breach of that duty. And, of necessity, the nature and amount of damages recoverable in each particular case are to be determined by the character of the message, and the extent of the injury caused by the defendant's default.

It is true that the "officer or agent" of the company who wilfully violates any of the provisions of section 1541 is, by section 1542, declared to be "guilty of a misdemeanor;" but that does not take the place of or diminish the civil liability. Both remedies are expressly given, and neither is exclusive, or in lieu of the other. The offending officer or agent is guilty of a misdemeanor, and he and the company are "*also* liable in damages to the aggrieved party."

The question with respect to the measure of damages in a case like this, though not of frequent occurrence heretofore, is not entirely new ; nor is the view we have expressed without express authority to sustain it.

Shearman & Redfield say:

"In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages, on account of the want of strict commercial value in such messages. *Delay in the announcement of a death, an arrival, the straying of a child, and the like, may often be productive of an injury to the feelings which can not easily be estimated in money, but for which a jury should be at liberty to award fair damages.* Yet in such cases the damages should not be enhanced by evidence of any circum-

stances which could not reasonably have been anticipated as probable from the language of the written message." Shear. & Red. on Negl. sec. 605, p. 662.

To the same effect are the following cases: *So Relle v. W. U. Tel. Co.*, 55 Tex. 303 (40 Am. R. 805); *G. C. & Sante Fe R'y Co. v. J. T. Levy*, 59 Tex. 542 (46 Am. R. 269); *Stuart v. W. U. Tel. Co.*, 66 Tex. 580 (59 Am. R. 623.)

In the first of these cases the telegraph company was held to be liable to So Relle for injury to his feelings, caused by its failure to promptly transmit and deliver to him a telegram announcing the death of his mother, whereby he was prevented from attending her funeral.

Levy's case is properly reported in the head-note, which is as follows:

"The plaintiff delivered to the defendant, a railway company operating a telegraph, a message on Sunday, announcing the death of his wife and child to his father, and requesting him to come to him. The defendant negligently failed to deliver the message until the next day, too late for the funeral. *Held*, that the plaintiff was entitled to recover, and that exemplary damages were proper."

In the other case, Stuart sued the defendant for the non-delivery of a telegram, whereby he was prevented from seeing his brother in his last illness, and being present at his funeral. Compensation for injury to his feelings was allowed, and a judgment for \$2,500 was sustained.

The father of the plaintiff in the Levy case, just mentioned, also brought suit for the negligent failure of the company to deliver to him his son's telegram. The court held that he (the father) could not recover for mental suffering, because he averred no actual damage to sustain his action; and in this decision So Relle's case was disapproved, to the extent that it was supposed to authorize a recovery for injury to the feelings only. *G. C. & Sante Fe Co. v. J. Levy*, 59 Tex. 563 (46 Am. R. 278.)

These four are the only cases bearing upon the exact question under consideration which we have been able to find, or to which our attention has been called by counsel.

Then, upon what we regard as sound reason, public policy, and authority as well, we are constrained to differ with his honor, the Circuit Judge, and hold that the first ground of demurrer is not well taken in any particular.

That the amount of damages allowable in such a case as this is not capable of easy and accurate mathematical computation is freely conceded ; but that should not be a sufficient reason for refusing or defeating the right of action altogether ; for the same objection may be urged with the same force in all cases where mental and bodily suffering are treated as proper elements of damage.

It is very appropriately said, however, in the conclusion of the opinion in *So Relle's* case, that "great caution should be observed in the trial of cases like this, as it will be so easy and natural to confound the corroding grief occasioned by the loss of the parent or other relative with the disappointment and regret occasioned by the fault or neglect of the company ; for it is only the latter for which a recovery may be had ; and the attention of juries might well be called to that fact."

Nor do we think the suggestion that the decision we are making may encourage the bringing of other suits of a similar nature is of very great moment, as a matter for the consideration of the court in its endeavor to reach a just and sound conclusion.

It is rather to be hoped that instances of such dereliction of plain, easy and important duty have not been very numerous in the past, and that they will seldom transpire in the future.

The other ground of demurrer is, that the plaintiffs cannot maintain this action for want of privity of contract between them and the defendant. This ground is also bad.

The question is whether a person to whom a telegraphic message is directed, has a right of action against the company for its negligent delay or non-delivery of the message.

"In England this question is undoubtedly answered in the negative. In America, on the other hand, it is invariably answered in the affirmative." *Gray's Com. by Tel.*

§ 65 ; Wharton on Neg. § 758 ; 3 Suth. on Dam. 314 ; Shear. & Red. on Neg. § 560 ; 2 Thomp. on Neg. p. 847, § 11.

The application of the American rule in this case is proper in the highest degree, for the messages themselves show unmistakably that they were intended for the benefit of Mrs. Wadsworth, and that she, of all persons, was the one interested in the intelligence to be conveyed.

Moreover, she is "the party aggrieved," and our statute gives the right of action to such party. Code (M. & V.), § 1542.

The judgment is reversed, and the case remanded, at the cost of the defendant.

The following concurring opinion was delivered :

TURNEY, C. J.: While fully concurring in the results of Judge CALDWELL's opinion, I do so upon the following grounds, as well as upon grounds stated in the opinion :

Our statute, after providing for the use of the telegraph in case of war, and for the arrest of criminals, enacts: "Any officer or agent of a telegraph company who fails or refuses to carry out the preceding section is guilty of a misdemeanor." Code (T. & S.), § 1321.

"All other messages, including those received from other telegraph companies, shall be transmitted, in the order of their delivery, correctly, and without unreasonable delay, and shall be kept strictly confidential." § 1322 (T. & S.)

Any officer or agent of a telegraph company who violates either of the provisions of the preceding section is guilty of a misdemeanor, and he and the telegraph company or proprietor are also liable in damages to the party *aggrieved*. § 1323 (T. & S.)

These provisions are broad and indiscriminating, embracing in terms all messages, commanding their transmission, and subjecting the agent and company or proprietor to respond in damages to the party aggrieved for a failure to comply. The law has made no distinction by defining the character of the message, the failure of whose transmission entitles a party to damages, and the courts can make none. So it must be that some damages may be recovered in any

sort of case when the law has been violated ; the amount, of course, depending on the facts of each particular case.

It is presumed that, if a party propose to send a telegram, it is of consequence to him, or to the person to whom it is sent, in an amount greater than the money charge for the transmission. With the extent of the interest or concern of the sender, or of the person to whom sent, the agent or company has nothing to do. When called upon to dispatch a message or deliver it, he has but one office to perform, which is to put his machine to work, and see that the message goes "correctly, and without unreasonable delay;" and, if one be sent to his office, that it be delivered "correctly, and without unreasonable delay." He will not be permitted to speculate upon the value or importance of the message. So far as he is concerned, that is a matter exclusively for the judgment of the sender or receiver. If he fail or refuse to send or deliver, the question of damages is one for the courts. So that, put the case as we may, we can evolve from the law but the one duty for the company through its agent, viz.: Send and deliver the message.

Telegraphy is young, and consequently comparatively little litigation has resulted from it. It is an institution *sui generis*. In laying down rules of law for its government, we must look to its uses. While it is a common carrier, and, as a rule, governed by the principles of law applicable to common carriers, this must be understood as not restricting courts to the literal definitions of the duties and liabilities of common carriers of persons or goods, but must be interpreted to meet the nature and purposes of the creature. The use of the telegraph can not possibly result in injury to the person or property, as it is not a carrier of either. Its only patronage is intelligence ; its only default is failure to transmit and deliver ; and for these alone can it be held to account in damages, and to these alone courts must direct attention and investigation. That it may be difficult to estimate the damages in some cases is no reason for saying an action does not lie. As said before, the circumstances of each case must determine the amount of damages.

We can not agree with counsel that mere sentiment is the

basis of this suit. The love of a sister for a brother, and her desire to be with him in his last moments, and after death, care for his body and its burial, are not mere sentiments. They are the promptings and commands of nature, affection, humanity, and duty; and should not be trifled with by indifferent, incompetent, or heartless operators in telegraph offices.

There is no danger of great wrong coming from the enforcement of damages for neglect of duty. If juries may occasionally assess excessive damages, the courts can and will correct the wrong. If companies do their duty in the selection of agents (an easy matter), they will have no occasion to complain. If they employ unworthy agents, and injury results to them therefrom, they have no right to complain, and should not be heard when they do. It is much easier for companies to correct the evil, and more consistent with their duty to do so, than that the public should submit to it. Let them understand that they have a duty to perform, and must do it, or respond in damages, and there will be an end to negligence and unfitness in operators, to whom the law allows no discretion, and the courts must give none.

The language of the statute authorizes this action in terms. It gives the right to sue to the "party aggrieved," the party to whom pain and sorrow have been given, and who has been vexed and harassed. When the law makes an act of omission or commission a criminal offense, and in the same connection (as here) gives a right of suit for such omission or commission, it follows of course that damages may be recovered in a civil proceeding.

NOTE.—LURTON, J., wrote a long dissenting opinion, in which FOLKES, J., concurred. The gist of the dissenting opinion is that damages for mental suffering, unconnected with bodily injury, can never be recovered except in actions for breach of promise of marriage.

The decision of this case was disapproved in *Chase v. Tel. Co.*, 44 Fed. R. 555.

See INDEX to this and to previous volume, titles "Damages," "Receiver or Addressee."

See note, vol. 1, p. 39.

WESTERN UNION TELEGRAPH COMPANY v. MARY E.
MUNFORD, executrix, &c.

Tennessee Supreme Court, Jan. 3, 1889.

(87 Tenn. 190.)

DELAY OF TELEGRAM.—LIMITING LIABILITY.—CONNECTING LINE.

A condition printed in a telegraph blank stipulating that "this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company, when necessary to reach its destination," is a valid limitation upon the liability of the company. Accordingly held that the user of such a blank has no cause of action against the transmitting company for the default of a connecting company by whose negligence the message was delayed.

Case of this series cited in opinion: *Marr v. W. U. Tel. Co.*, ante, p. 720

APPEAL by the defendant below from a judgment of Circuit Court, Warren county, awarding damages for delay in the transmission of a telegram sent by plaintiff's testatrix, by whom the action was originally brought.

Facts appear in opinion.

J. W. Bonner, for telegraph company.

Frank Spurlock, for Munford.

LURTON, J.: This is an action brought by E. W. Munford, the testator of defendant in error, in his lifetime, to recover damages alleged to have been sustained by delay in transmission of a telegram. E. W. Munford, on the 11th of April, 1887, delivered to the agent of the plaintiff in error, at its office in McMinnville, Tenn., a telegram for transmission to Tampa, Fla., of which the following is a copy:

"McMINNVILLE, Tenn., Apl. 11, 1887.

"Col. Sam Tate, Tampa, Florida: Proposition accepted. Your draft for one thousand will be honored.

[Signed],

"E. W. MUNFORD."

Telegraph Co. v. Munford.

The line owned and operated by the Western Union Telegraph Company did not extend to Tampa, Fla., but terminated at Jacksonville, in that State. From Jacksonville to Tampa there was a telegraph line, owned and operated by the South Florida Telegraph Company, and the message in question could only be transmitted to its destination by being sent over the line of the Western Union Telegraph Company to Jacksonville, and then transferred to the South Florida Company, by whom it would be sent to Tampa. Of this fact Mr Munford was advised by the agent who received his message for transmission. The telegram was promptly forwarded, reaching Tampa early in the afternoon of the same day. In transmission the address of the message was changed from "Col. Sam Tate" to "Col. Wm. Tate." This, it is agreed, occurred on the line of the plaintiff in error before it was transferred to the connecting company. The message was not delivered by the South Florida Company to Col. Tate until the 13th, it having been received at Tampa on the 11th. Plaintiff below alleged that by this delay he sustained damages amounting to \$500.

In the view we take of the case, it is only necessary to consider one of the defenses presented by the pleas of the plaintiff in error; and that, in substance, is that the delay in the delivery of the message was not occasioned by the error in transmitting the address, but resulted alone from the negligence of the agent of the South Florida Company.

The facts concerning the delay, as we find them to be from the transcript, are these: The agent of the South Florida Company at Tampa personally knew Col. Sam Tate. He states that he knew of no such person as Col. William Tate, and that when he received this message he believed it to be intended for Col. Sam Tate; that he instructed the messenger, whose duty it was to make personal delivery of messages, to inquire and learn if there was a Col. William Tate in Tampa, and, if he could hear of no such person, to take the message to Col. Sam Tate. The messenger thus instructed says he made inquiry, and,

hearing of no William Tate, undertook to deliver the message to Col. Sam Tate; that he took it to the office of S. A. Jones, where both he and the agent say they had been requested by Mr. Jones to leave messages for Col. Tate. The messenger states, upon inquiry for Col. Tate, a clerk in the office informed him that Col. Tate was then at Clear Water Harbor. This information being communicated to the agent of the telegraph company, he, on the same day, instead of making further inquiry for Col. Tate, mailed the message addressed to Col. Sam Tate at Clear Water Harbor, Fla. The fact, as shown by the proof, is that Col. Tate was in Tampa on the 11th, and had been there for some days, and that he had never authorized delivery of messages for him at the office of Mr. Jones, but that, on the contrary, he was accustomed to receive his messages at his usual boarding place, which was known at least to some of the telegraph company's messengers. Two days thereafter Col. Tate called at the telegraph company's office to inquire about another message, when he was handed a copy of the telegram which had been mailed to him at Clear Water Harbor. If the message had been delivered to him on the day it was received and mailed to Clear Water Harbor, it is conceded that the damage alleged to have been sustained would not have occurred. The facts, as above recited, are not disputed, and establish beyond controversy that the delay in the delivery of the message was not in consequence of the error in transmission of the address, but was the result of the subsequent and independent negligence of the South Florida Telegraph Company. The damage alleged to have been sustained was the direct consequence of delay in delivery, for Col. Tate says that he should have had no doubt, upon seeing the message, that it was for him alone, and that he should have acted upon it. The damages to be recovered, whether the *gravamen* of the action be regarded as a breach of contract or a technical tort, must be limited to such as are the natural and proximate result of the injury or wrong done.

Telegraph Co. v. Munford.

This brings us to the consideration of the question as to whether the plaintiff in error is responsible for damages which resulted alone from the negligent delay in the delivery of this message by the agent of the South Florida Telegraph Company. The message was written upon one of the usual blanks furnished by the Western Union Company. One of the printed conditions contained on this blank reads as follows: "This company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company, when necessary to reach its destination." Is this a valid limitation upon the liability of the company?

Telegraph companies are not common carriers, nor are they insurers, either of the accurate transmission, or the sure and prompt delivery of messages. They are liable, however, for losses consequent upon their negligence. *Marr v. Western Union Telegraph Co.*, 1 Pickle, 536.

Even common carriers are not responsible for losses occurring upon a connecting line, unless there was a contract upon their part to be so responsible. That they may by contract limit their liability to defaults occurring upon their own lines is well settled. So the fact that two lines are connected, and for their mutual convenience collect freight for each other upon goods delivered for transmission over both lines, will not make the one responsible for losses occurring beyond its own line, unless it has contracted so to be. *Brumley v. Railroad*, 5 Lea, 401.

These principles applicable to common carriers seem to us to be alike applicable to telegraph companies. Mr. Gray, in his very valuable monograph upon Communication by Telegraph, in discussing this limitation found in the contract of the Western Union Company, and quoted above, says:

"Two entirely distinct provisions are embodied in this regulation. One provision is that the telegraph company, in consideration of receiving full prepayment for the delivery, of a message at a place upon the line of another

company agrees to deliver the message to a connecting company, and as the agent of the sender, to contract with that company for the further transmission of the message. This is an offer of special terms of contract. A telegraph company is, it seems, under an obligation, by its ordinary contract, only upon receipt of its own charges, to deliver the message to a connecting company. It is under no obligation by that contract to contract, as the agent of its employer, with the connecting company for the further transmission of the message, or to receive and account for the payment for such transmission. This provision in the regulation is unquestionably reasonable, and, with the assent of the employer of the company, constitutes a valid and mutually beneficial contract. * * *

“The other provision embodied in this regulation is that the telegraph company limits its liability to losses occurring on its own lines. This has usually been treated as an offer of special terms. As such, it constitutes, with the assent of the employer of the company, a valid contract. This provision is clearly just and reasonable. In the absence of partnership relation between them, one telegraph company has no more authority over another telegraph company than an individual has. A telegraph company should be entitled, therefore, to contract specially, with one who wishes to employ it, that it shall not be liable for loss occasioned by the act of a connecting company; that that person shall seek relief, in case of a loss, directly of the company which causes, and is, under any circumstances, finally liable for the loss.” Gray on Tel. Communication, section 33.

That the Western Union and South Florida Telegraph Companies were entirely distinct and independent corporations, and that no partnership relations existed between them, is admitted in the agreed statement of facts contained in the record. The case was tried by the Circuit Judge without the intervention of a jury, who, being of opinion that the error in transmission of address was the

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proximate cause of the damage sustained, gave judgment in favor of the plaintiff below.

This judgment is not supported by any material facts, and must be reversed, and judgment rendered here in favor of the Western Union Telegraph Company.

PEPPER V. THE WESTERN UNION TELEGRAPH COMPANY.

Tennessee Supreme Court, May 7, 1889.

(87 Tenn. 554.)

**ERROR IN TELEGRAM.—LIMITING LIABILITY.—UNREPEATED MESSAGE.—
CIPHER DISPATCH.—DAMAGES.—COMPANY NOT AGENT OF SENDER.**

A telegraph company cannot, by the repetition clause in message blanks, relieve itself from liability for its own negligence.

The use of abbreviations common to the trade and known to the defendant's agents does not make a cipher dispatch.

It is sufficient, in order to hold a telegraph company for damages caused by erroneous transmission of a telegram, that it indicate on its face that it is important, or that the agents of the company be so advised. It is not necessary that it be able to foresee how or how much loss may arise.

The telegram was in reply to one asking the price of certain meats. The price as transmitted and delivered was less than that presented for transmission. The addressee ordered goods and paid for them at the higher price; the action was to recover the excess thus paid by him. That was allowed as his measure of damages by the trial court, upon the theory that the company was the agent of the sender, who was thus bound to pay the price as wrongly delivered, and must then seek relief against the company.

Held, that the ground was erroneous, but that, in absence of proof that his loss could have been made less by pursuing any other course, the recovery might stand, as based upon the proper measure of damages.

Case of this series cited in opinion: *Marr v. W. U. Tel. Co.*, vol 2, p. 720; *W. U. Tel. Co. v. Shotter*, vol. 1, p. 557.

APPEAL from judgment rendered in Chancery Court, Shelby county. Facts stated in opinion.

Craft & Craft for complainants.

Turley & Wright for respondent.

FOLKES, J.: This is a suit by complainants to recover damages for a breach of a contract to deliver correctly a certain telegram intrusted to defendant as the owner and operator of a telegraph line.

The facts necessary to a correct understanding of the case are as follows :

On October 5, 1886, R. F. Bugg & Co., produce brokers at Birmingham, Ala., sent by defendant company to complainants, who were produce dealers at Memphis, this telegram : "Quote cribs loose, and strips packed." Thereupon complainant wrote out upon the usual printed blanks of the defendant company, and delivered to the proper agent of the defendant for transmission, this reply, addressed to Bugg & Co., at Birmingham : "Car cribs six sixty, c. a. f., prompt." The word "cribs" meant in the meat trade clear ribs, and c. a. f. meant cost and freight. These terms were well understood in the trade and by the defendant.

This telegram, as delivered by the company to Bugg & Co., read "six *thirty*," instead of "six *sixty*," being in other respects correct.

Thereupon Bugg & Co. ordered a car-load of the meat, amounting to 25,000 pounds.

Complainants shipped the meat, and drew on Bugg & Co. for \$1,650, the price of the meat at six sixty. Bugg & Co. refused to pay the draft, relying on the telegram as received by them ; and complainants accepted of them \$1,575, the value of the meat at the price of "six *thirty*," making a loss to complainants of \$75.

Complainants at once notified the company of the mistake, and that the same had entailed upon them the loss of \$75, and demanded payment of this sum, which the company declined to make.

The defendant, in its answer, says it is not liable :

First—Because the telegram in which the error occurred fails to give any idea as to its true meaning, whereby defendant was unable to judge of its importance; that it can only be held liable for damages which it might reasonably have contemplated as a result of its error; “that it is not responsible for results flowing from a mistake in the transmission of such cipher dispatches.”

Second—That the dispatch not being repeated, their liability is, by the terms of the printed blank, which is the contract, limited to the cost of the telegram.

Third—That in no event are they liable for the difference in the price contained in the telegram as received by it, and the price in the message as delivered by it to Bugg & Co., *i. e.*, between \$6.60 per 100 pounds, and \$6.30; claiming that complainants could have recovered their meat from Bugg & Co., as it was shipped in consequence of said mistake.

There was judgment for the complainants for the sum of \$75, with interest from the date of the delivery of the meat.

Defendant has appealed, assigning errors.

It is unnecessary for us to determine what is the measure of damages for error in the transmission of a telegram written in cipher, a question upon which the authorities are not in harmony, and one where there are very many nice distinctions and refinements.

The telegram before us is in no sense in cipher. It is an abbreviation merely, and, from the proof in the cause, an abbreviation known to the company. It fully apprised the company that a proposition to sell clear rib meat in car load lots at \$6.60 per 100 pounds was made, and the company could reasonably have anticipated that if the proposition was accepted, the writer of the message would forward the goods in expectation of such price, and that his loss, if there was an error in delivering the message by the negligence of the company, would be the difference between the real value of the goods and the price at which the sender, in the exercise of reasonable prudence, might be able to dispose of them when rejected by the proposed

purchaser in consequence of the error. In other words, the company knew that carelessness or mistake in the delivery of the message might expose the sender to pecuniary loss, the amount or extent of which it was not necessary for it to know. "It is only necessary that the damages be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, such as might naturally be expected to follow its violation;" and it was only necessary for the company to know that the telegram related to a matter of business which, if improperly transmitted, might lead to pecuniary loss, upon the basis above suggested, to be increased or diminished according to the particular circumstances of the case, and to be determined upon the rule of compensation to the party injured.

The second matter of defense set up in the answer, predicated upon the terms of the special contract contained in the printed blanks of the company, need not be noticed, since the case of *Marr v. Western Union Telegraph Company*, in 1 Pickle, 529, which settles, in this State, in accord with the overwhelming weight of authority, that such stipulations will not avail the company where the damage has resulted from the negligence of its agents or officers.

The mistake, or error, here is clearly shown to have been occasioned by such negligence. Indeed, learned counsel for the company have not made any contention to the contrary in this court.

This brings us to the consideration of the third and serious ground of defense—the measure of damages in this particular case.

The contention of the counsel for complainants is, and such was the view of the learned Chancellor, that the company was the agent of the complainants as the sender of the telegram, and that the complainants were therefore bound to let Bugg & Co. have the goods at \$6.30, the price erroneously named in the dispatch as delivered; and that the loss must be measured by the difference between the price at

which they were willing and expected to sell, and the price at which, in consequence of the error of such agent, they were compelled to sell.

In our opinion this contention cannot be maintained, either upon principle or authority.

The minds of the party who sends a message in certain words, and the party who receives the message in entirely different words, have never met. Neither can, therefore, be bound the one to the other, unless the mere fact of employment of the telegraph company, as the instrument of communication, makes the latter the agent of the sender. Upon what principle can it be said such an agency arises? The telegraph company is in no sense a private agent; it is clothed by the State with certain privileges—it is allowed to exercise the right of eminent domain. In exchange for such franchises it is onerated with certain duties, one of which is the obligation to accept, and transmit over its wires, all messages delivered to it for that purpose. The parties who resort to this instrumentality have no other means of obtaining the benefits of rapid communication, which is the price of its existence. They have no opportunity and no power to supervise or direct the manner or means which the company use in the discharge of their duties to the public in the transmission of messages for particular individuals. They can only deliver to the company a legible copy of what they wish communicated, with no expectation that such paper is to be carried to the party addressed; and their connection with the company there and then ceases. They have contracted with the company to transmit the words of the message to the party addressed, through its own agents, and with its own means. The party receiving the message knows that he is not obtaining any communication direct from the sender, but that he is receiving what the company has taken, and changed the form of, from the paper on which it was written, transmitted by electricity over the wires of the company, and reduced to writing at its destination by an agent of the company; and that it only represents *what was written* by

the sender, in the event that there has been no imperfection in the mechanism of the company, nor negligence in the servants of the company. Knowing the scope of the employment and the methods of transmission, the receiver should be held to know that the sender is bound by the contents of the telegram as received only so far as it is a faithful reproduction of what it sent. He knows, furthermore, that if he acts on the telegram, and it should turn out to have been altered by the negligence or wrongful act of the company, the latter is liable to him for such injury as he may sustain thereby.

Ordinarily there is no relation of master and servant between the sender of the telegram and the company. Where this relationship does not exist the principal is not responsible for the torts of the agent, and the negligent delivery of an altered message, when acted on by the receiver to his detriment, is a tort, for which the telegraph company alone is responsible.

The company retaining exclusive control of the manner of performance, and of its own employés and instrumentalities, the sender of the message being absolutely without voice in the matter, it seems to us that the position of the company to its employer is that of "independent contractor," as defined as understood in the well-settled class of cases where the employer is held to be not responsible for the negligence of the contractor in the performance of his work or undertaking.

The many and marked differences between the employment of such companies to transmit a dispatch and the employment of a private person to deliver a verbal message, are so manifest that we can not assume the liability of the sender in the first instance, from his conceded liability in the last for the negligence of the instrumentality employed.

Such a holding not only does violence to well-settled principles of the laws of agency, but may lead to the absolute ruin of the party employing this useful, and now necessary, public medium of rapid transmission of intelligence; so that every consideration of public policy would seem to

point to a different result, unless the courts find themselves constrained by the great weight of authority to uphold the contention here made.

How are the authorities?

In England and in Scotland the idea of agency in the company, so as to bind the sender upon a telegram negligently changed in the transmission, is repudiated. *Henkel v. Pope*, L. R. 6 Exch. 7; *Verdin v. Robertson*, 10 Ct. Sess. Cas. (3rd series), 35.

Mr. Gray in his work, while stating the law to be in England and Scotland as above, says that in this country the rule is in general otherwise, citing a number of cases in note 3, § 104.

It is to be noticed, however, that this author, after making the statement above given, throws the weight of his learning and research against what he says is the tendency of the American courts, and in an instructive discussion of the question seems to demonstrate that the English rule is the correct one.

It is also worthy of remark that in the note already referred to, he follows the citation of the cases which are said to make the American rule with the statement that "as a matter of fact it has been decided in a *single instance only* (*Western Union Telegraph Company v. Shotter*, 71 Ga. 760) that the receiver of an altered message is entitled to hold the sender responsible upon its terms;" adding "that the principle which would allow him to do so, however, has been considered in the other cases."

Let us see what may be briefly said of the other cases:

In *Wilson v. Minn. & Northwestern Railroad Co.*, 31 Minn. 481, it is apparent from pages 482-3 of the opinion that the question of agency was really not involved.

With *Rose v. U. S. T. Co.*, 3 Abb. Pr. Reps. N. S. 408, we content ourselves with what Mr. Gray says of this case: "It seems to affirm that the employer of a telegraph company is responsible upon a negligently altered message, but it does not necessarily determine the question.

"The case decided that the plaintiff, who was the agent of

the sender of a message altered through the negligence of the defendant, could not maintain an action against the defendant for the injury sustained through acting upon that alteration.

“The decision was rested upon the ground that the plaintiff had sustained no injury through the act of the defendant, since he had a perfect remedy for his loss against the sender of the message. The ground of this decision is open, perhaps, to objection.” See § 104, note. Continuing, the author says:

“Assuming its sufficiency, it may be urged that the case in reality decided only that the employer of a telegraph company is responsible upon a negligently altered message where the relationship of principal and agent exists between him and the receiver of that message—a decision which does not determine the question under consideration.”

“*Dunning v. Roberts*, 35 Barb. 463, is of little weight. The case decided simply that the defendant was responsible upon a message which was unquestionably correctly transmitted and delivered—although it was not the one that he wished sent—upon the ground of the relationship of principal and agent existing between himself and the actual sender of the message. The latter, moreover, in the absence of the operator of the company, telegraphed the message himself, so that no contract at all was made between the telegraph company and the defendant.”

In *Saveland v. Green*, 40 Wis. 431, there was no question of a mistake in the dispatch; the only question was whether the telegram received, where no mistake was claimed, was to be treated as the original, so as to make it competent evidence of the contents of such telegram.

Durkee v. Vermont Cent. R. R. Co., 29 Vt. 127, decides that the original, where the person to whom it is sent takes the risk of its transmission, or is the employer of the telegraph company, is the message delivered to the operator; but where the person sending the message takes the initiative, so that the telegraph company is to be considered as his agent, the original is the actual message delivered at

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the end of the line. In this case there was no question of mistake, nor of the sender being bound thereby, but merely a controversy as to what was original, and what was secondary, evidence of the contents of a telegram.

Moreover, if this case decides anything pertinent to the case at bar, it is that, as Bugg & Co. first invoked the services of the telegraph company, inviting a reply from complainants through the same medium, the company in such case was the agent of Bugg & Co., and not of complainants, so that the latter would not have been bound by the negligence of the company.

N. Y. & Wash. Pr. T. Co. v. Dryburg, 35 Pa. St. 298, is a case where the receiver of an altered message, who had suffered injury thereby, was allowed to recover against the telegraph company as for a tort. If the telegraph company is the agent of the party who sent the telegram, then we are unable to see how the receiver actually suffered injury in this case, because, if the sender of the telegram was bound to make good to the receiver the contract as reported in the altered message according to its terms, then the party addressed could have recovered of the sender the value of the 200 bouquets called for in the altered message, instead of 2 bouquets.

What is said in this case as to agency of the company so as to bind the sender is pure *dictum*.

Howley v. Whipple, 48 N. H. 487, the next case cited by Mr. Gray in the note referred to, so far as it touches the question now under consideration, is a mere *dictum*, and it would be uninformative in this connection to state what it really does decide. The character of the question before that court may be inferred from a quotation which the opinion makes from § 340-1 of Scott & Jarnagin on Telegraphy, adding that "many cases are cited in the above work from which it is held that in all controversies between the sender of the message and the company the original message is the one left at the office by the party sending it. But where a man sends a proposition to another by telegram, and gets a reply accepting the offer, the original

message, so far as binding the acceptor is concerned, is the one delivered to him at the other end."

So of *Barons v. Brown*, 25 Kan. 410; *Matteson v. Noyes*, 25 Ill. 591; *C. & St. L. R. R. Co. v. Mahoney*, 82 Ill. 73; *Williams v. Brickell*, 37 Miss. 682; *C. & I. R. R. Co. v. Russell*, 91 Ill. 298; *State v. Hopkins*, 50 Vt. 316. They relate alone to the question of original and secondary evidence, so far as they touch directly or indirectly upon the matter now under consideration.

Morgan v. People, 59 Ill. 58, was where the plaintiff in an execution telegraphed to the sheriff to hold up the sale contemplated thereunder. The sheriff refused to obey the telegram, and was sued for damages by the owners of the property. It was held that the telegram delivered to the sheriff was the original, and that he should have obeyed it. There was no alteration or mistake in the telegram.

Smith v. Easton, 54 Md. 138, was this: Smith & Whiting, who were creditors of W. H. Easton, determined to attach his property to secure their debt. It was agreed, however, that he might telegraph to his brother, J. T. Easton, in New York, and that all parties would await the reply. W. H. telegraphed to J. T. as follows: "Smith & Whiting are here, and will attach if not secured." He received a reply saying: "Will endorse your Smith & Whiting note,—three months." Smith & Whiting took the note of W. H. Easton at three months in satisfaction of their claim, and sent it to J. T. Easton, in New York, for his indorsement which was refused. Thereupon they sued him, and introduced the telegram that was received by W. H. Easton, upon which they had acted. The court held that the telegram received was not evidence of a liability upon J. T. Easton, but that the message written by J. T. should have been introduced or accounted for.

This certainly decides nothing to support complainant's contention here. On the contrary, the logic of it would seem to be adverse to the idea of agency in the company; for, if the company was the agent of the sender when it

delivered the telegram, the telegram, as delivered, was the act of the principal, and ought to bind him.

We have devoted more time and space to these cases than might appear to be necessary, but, as they are summed up in the note referred to by Mr. Gray as the cases that are regarded as making what is called the rule in America, it was deemed not out of place to ascertain what they were.

We make and have no criticism upon what these cases do decide; we merely say that they are not authority upon which to predicate the claim that the courts in this country have established or settled the question under consideration. As already stated, Mr. Gray not only shows that upon principle the English holding is the correct one, but, while listing the cases above mentioned as indicating a contrary view, he states that most of them are *dicta*.

There is but one case referred to by him, and the industry and learning of counsel have produced no other, which directly adjudges that the sender of a telegram is bound to the receiver by the terms of the message as negligently altered by the company. That is the case of *Western Union Telegraph Co. v. Shotter*, 71 Ga. 760.

With very great respect for the high character of that learned tribunal, we cannot approve the line of reasoning pursued, nor the conclusion therein reached. The facts of the case present the question exactly in the shape, and under the same circumstances, which we have in the case at bar. The learned judge delivering the opinion places his conclusion in part on the fact that in England the government has charge of the telegraph lines, and upon the idea that a merchant or business man would lose credit and commercial standing were he to refuse to make good to his correspondent the contract contained in his message as delivered. We can not see how the fact of governmental charge of the telegraph system can make any difference, for in this country the sender is as impotent to control and direct the movements and conduct of the telegraph company as if it were under the government, while in no sense can

the company be said to be a bailee or carrier of the particular message.

Nor can we see how the commercial standing of the sender, who remits his correspondent to his recourse on the telegraph company for such injury as may result from the erroneous message, can be affected.

The Georgia case, however, while holding that the sender was bound to let the receiver have the goods at the reduced price stated in the erroneous message, decides that the sender is not entitled to recover from the company, as damages, the difference between the price as written by the sender, and that delivered by the company, upon the ground that there was no evidence that the purchasers, at the points where the telegrams were received, would have given the price at which the goods were offered in the correct telegrams, nor what was the market value of the goods at the place to which they had been shipped in consequence of the error, the court holding that the measure of damages in such case was "the difference between the price offered by the error of the telegram and the market value at the point to which shipped,—that is, what the seller could have gotten there."

This case, therefore, though holding as stated concerning the idea of agency, is opposed to the conclusion of the Chancellor in the case at bar on the measure of damages.

Being of the opinion, then, that the complainants were not bound to let Bugg & Co. have the goods at the price erroneously communicated by the telegraph company, but that it was their privilege to have reclaimed them when Bugg & Co. refused to pay the price as written by complainants, let us see what were their rights and duties, and what is the criterion of damage in such a case. They were bound to have taken just such steps as a reasonably prudent man would take to save himself had the mistake or error been his own.

A man, under such circumstances, is not to be held to have done the wisest and best thing, but to the exercise of reasonable skill and diligence. Whether he so acted or

not is a question of fact to be left to the jury under proper instructions by the court in a jury case, and for the court to try as any other question of fact in chancery or non-jury cases.

What would be prudent in one case might be very unwise in another, dependent on the character of the goods, the market value in the place to which sent by the mistake, or the value at the place from which sent, regard being had to storage, expense of selling, handling, freights, depreciation of perishable goods, and fluctuations in the market, etc.

For instance, in one case it might occasion less loss to sell at the price named in the message as erroneously delivered, where the cost and risk of storage and selling in that market would be heavier than the difference in the price as sent and the price as received, or the cost of returning the goods where the freight both ways might be more than such difference. Where the difference in the price as sent and the price as erroneously delivered was greater than would be the cost of such retaining and selling there with freight one way, or greater than returning with freights both ways, regard being had to the markets at the two places, then he ought not to sell at the price so named, but should retain, or return, according to his best judgment.

In such cases the courts will not be over nice, on behalf of the negligent company, in adjusting the scales to the wisdom of the several means open to the party injured, and undertake to weigh carefully the question as to what was best, as then appeared, and certainly not as to what was best as seen in the light of subsequent events, but will merely require the victim of the negligence to act in good faith, in the exercise of ordinary prudence, in the effort to extricate himself from the situation in which he has been placed.

Where this has been done, the loss resulting will be the measure of damages which he will be entitled to recover, upon the doctrine of compensation.

It is manifest that it would be unreasonable to expect the same conduct in a case where the goods shipped in con-

sequence of the negligence of the company was lumber, coal, or the like, where freights would be a large factor in the loss, and in a case where the goods were bonds, diamonds, and the like, where freights are insignificant, compared with value; such considerations, together with the facilities for sale, proximity to other markets, and the like, are to be regarded in connection with the facts and circumstances of each particular case.

This is a summary of the result of general principles, all of which are too well settled to require citation of authority.

Applying these principles to the case at bar, we find no proof in the record that would enable us to ascertain the damages fairly resulting from the negligence of the telegraph company. There is nothing to show what was the market value of the meat at Birmingham, nor at Memphis, unless the telegram as written by the senders is to be considered as fixing it. This is evidence of what the sender was willing to take for it, and in the absence of proof to the contrary, may be said to furnish evidence of the market value in favor of the party making the offer, as against third parties. There is no proof as to freight either way, so that we cannot say whether the complainants have acted prudently in selling at the price named in the erroneous telegram, or whether he should have sought other purchasers at Birmingham, or recalled the meat to Memphis, or taken some other course. In the absence of some such proof, it is impossible for the court to ascertain the extent of the injury inflicted by the company's negligence, so as to fix and determine the compensation therefor with certainty.

But the negligence being established, and the complainants having shown that they disposed of the goods at the price named in the erroneously delivered message, which was one of the means open to the shipper of extricating himself with the smallest loss, and there being no proof whatever tending to show that such disposition of the goods was not the very best thing to be done under the circumstances, we are of opinion that the difference between the

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price named in the telegram as sent and as delivered, where sale is actually made at the latter price, may be taken as the correct measure of damages where, as in the case at bar, the difference is not so great as to excite suspicion, and where from the character of the goods it does not appear unreasonable and improper to make such disposition of the goods. Where the conduct of the party injured, in his efforts to extricate himself from loss, does not appear to have been improvident, nor in bad faith, and the loss is shown from such conduct, the burden of proof is upon the author of the wrong to show that the loss might have been mitigated by a different course of conduct, which a reasonably prudent man ought to have taken. In the absence of such proof the loss, as shown, will be taken as the correct measure of damages in the particular case. Of this, the wrongdoer certainly cannot complain; the fault being his that there is not proof that some other course of conduct would have lessened the damages.

Let the decree be affirmed, with costs.

NOTE.— See INDEX to this and to previous volume, titles “Limiting Liability,” “Damages.”

See notes, vol. 1, pp. 58, 99; vol. 2, p. 654.

C. B. STUART, JR. v. WESTERN UNION TELEGRAPH
COMPANY.

Supreme Court of Texas, June 25, 1886.

(66 Tex. 580.)

DELAY OF TELEGRAM.—DAMAGES.—MENTAL DISTRESS.

Mental distress is a proper element of damages in an action based upon the negligent failure of a telegraph company to promptly deliver a message.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Brown*, vol. 1, p. 481; *Gulf, &c. Co. v. I. Levy*, vol. 1, p. 536; *Gulf, &c. Co. v. J. T. Levy*, vol. 1, p. 543; *So Relle v. W. U. Tel. Co.*, vol. 1, p. 348.

ACTION for damages. Facts stated in opinion.

John T. Pierce, W. H. Pope, and T. P. Young, for appellant.

Stemmons & Field, for appellee.

ROBERTSON, Associate Justice: The appellant, who was the plaintiff in the court below, sued the appellee for damages, and recovered a judgment for \$2,500. The appellee made a motion for a new trial, which was overruled, and the court below then of its own motion arrested the appellant's judgment and set it aside on the ground that the petition was insufficient in law to sustain a judgment. From this judgment the appellant appealed, and the only question presented is upon the sufficiency of the plaintiff's petition.

The appellant alleged in his petition that he was a citizen of Harrison county, and appellee was a body politic duly incorporated, which was represented in said Harrison county by J. P. Morrison, its local agent, and that appellee oper-

ated and owned on February 3, 1883, a telegraph line from the city of Marshall, in said county, to the city of Waco, in McLennan county, Texas, and, for hire, transmitted telegrams for the public between said points. Appellant being informed in Waco, where he then resided, that John E. Stuart, his brother, who lived in Marshall, was there sick, he instructed G. W. Stuart, another brother of his, who also resided in said city, to inform him by telegraph of his brother John's condition; that said G. W. Stuart, as appellant's agent, on February 3, 1883, delivered to the agent of appellee, in Marshall, a telegram, as follows:

" MARSHALL, Texas, Feb. 3, 1883.

"To C. B. Stuart, Jr., Waco, Texas, care of Stuart & Harris, attorneys:
John is very low, come on first train. "G. W. STUART."

That at the time of delivering to the agent the message he paid fifty cents, the customary charges for transmitting the same, and informed the agent of the circumstances requiring the speedy transmission and delivery thereof; that the message was correctly transmitted and received at appellee's office in Waco, by its agent, at three o'clock P. M., on February 3, 1883; that being in a state of anxiety and momentarily expecting a telegram from his agent, G. W. Stuart, appellant, in person, called at the office of appellee, in Waco, at four o'clock P. M., on February 3, 1883, and asked the agent of appellee if any message had been received by him for appellant, and that the agent told him that none had been received; that he then informed the agent that his brother was sick in Marshall, and that he was expecting a telegram from there in reference to his condition, and that if it should come to send it to his office, informing him at the time where his office was. Not having received any telegram, he again, about nine o'clock on the morning of February 4, 1883, called at appellee's office in Waco, and asked if any message had been received for him, and was told by the agent of the appellee that none had come; that he again instructed the agent to send the telegram, if it should come, to his office;

that on the morning of February 5, 1883, the telegram above set out was delivered to him, and that he immediately started for Marshall, and traveled as speedily as he possibly could, but when he arrived his brother John had died and was buried; that if the telegram had been delivered to him when he called for it on February 3, he could have reached Marshall in time to have seen his brother alive; and that if he had received it when he called for it on the morning of February 4, he could have reached Marshall in time to have attended the funeral services of his brother; and in consequence of all of which he had suffered great disappointment, grief and mental anguish. Appellant also alleged that he was on February 3, and had been for some time, a practicing lawyer in Waco; that his office was in speaking distance of the defendant's office, and that he had his card in the Waco Examiner, a paper having a wide circulation in that city, and his sign, as such lawyer, was suspended over the pavement in front of his office, in full view of all persons passing; and that he had repaid to G. W. Stuart the amount he paid appellee's agent.

These averments disclose a contract between the appellant and the appellee, by the terms of which the appellee, for a valuable consideration, bound itself to deliver to appellant, promptly the message described, a breach of this contract on appellee's part and actual damage sustained by the appellant at least in the sum paid to appellee as the consideration for transmitting the message. For the breach of contract the appellee was liable at all events for nominal damages. *Telegraph Company v. Dryburg*, 35 Penn. St. 298.

But the only averments in the petition which can at all sustain the amount of the judgment rendered are those which describe the harrowing effects upon the feelings of appellant as the result of the negligence of the appellee. Appellant's agent at Marshall, when he delivered the message for transmission, fully informed the appellee of the meaning of the telegram and the importance of promptly delivering it. The poignant distress suffered by the appellant was, therefore, proximately, and in the contemplation

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of appellee, caused by, and under the painful circumstances described, naturally would result from the appellee's negligence.

The petition does not disclose a case for exemplary damages. The rule as stated in *Telegraph Company v. Brown*, 58 Tex. 170, perhaps needs to be qualified; but tested by the rule most liberally interpreted in behalf of appellant, no such case is shown as would justify the court in punishing appellee for the wrongful acts of its agents. Unless, therefore, injury to feeling is a proper element of actual damage, the petition does not sustain the judgment. It was determined by this court in the case of the younger Levy (59 Tex. 547) that we have no forms of action or technical rules which can prevent the plaintiff, upon a statement of the facts of his case as authorized by our system of pleading, from recovering all the damages shown to be sustained. If the facts stated show a breach of contract, and also that the breach is of such character as to authorize a suit as for a tort, all the damages recoverable for the thing done or committed, either in an action *ex delicto* or *ex contractu*, may be recovered in the one suit. It is claimed by counsel for appellee that injury to feelings in this kind of suit is held by this court in both the *Levy cases* (59 Tex. 543, 563) to be exemplary damages. We do not so understand either of those authorities. In the elder Levy case it was held that one not entitled to recover nominal damages, as for a breach of contract, nor sustaining any damage to his person, name or estate, could have no recovery for mental distress alone. In that case the telegraph company had no contract with Levy, had broken no engagement with him nor violated any contract it had made with any one else for his benefit. It owed him no duty, and violated no right of his, and though its conduct may have outraged his sensibilities, it had done him no legal wrong.

In the other Levy case, the petition was excepted to on the ground that it showed no facts constituting a basis of damages; the exceptions were overruled; the plaintiff

recovered, and the defendant, appealing, assigned as error the action of the court in overruling the exceptions to the petition. The petition, like that in this case, was a statement of the facts regardless of the forms of action. "Upon the whole case, as made by the petition and evidence," this court held, "that the appellee was entitled to recover whatever damages the proof may justify over and above such sum as he paid for the transmission of the message, and this in the way of exemplary damages," if a case for such damages is made. Whether the damage arising from mental distress was actual or exemplary, was not discussed or decided, but it was held that such damage, which in that case, as in this, was mainly the basis of the suit, could be recovered. "Otherwise, in a large class of cases, most grievous wrongs may be inflicted in matters as vitally affecting the welfare of individuals, as in other matters to which a pecuniary value, a market price, can be fixed ; and this, in disregard of a duty voluntarily assumed to the public, to secure the due performance of which, many privileges, not possessed by persons generally, are conferred by the State upon the offending party." That mental suffering, resulting from an indignity to the person, is actual damage, is held by this court in the case of *Hays v. Railroad Co.*, 46 Tex. 272. Pain of mind, anxiety and all the forms of distress peculiar to a sentient being, have been held elements of actual damage in suits for injuries to the person through the negligence of others. Our own reports contain many such cases. But it is claimed that in those cases the mental is an incident of bodily pain, and that without the latter the former can not be considered as actual damage. In cases of bodily injury the mental suffering is not more directly and naturally the result of the wrongful act than in this case, not more obviously the consequence of the wrong done than in this case. What difference exists to make the claimed distinction ? That it is caused by and contemplated in the doing of the wrongful act, is the principle of the liability. The wrong-doer knows that he is doing this damage when he afflicts the mind by

withholding the message of mortal illness, as well as by a wound to the person. In cases of slander and libel, injury to the feelings is actual damage (3 Suth. on Damages, 645 *et seq.*) ; it is the natural result of the wrongful act. The appellee knew, according to the averments of the petition, that in delaying the delivery of the message it had undertaken to transmit, it was denying appellant the opportunity, he had contracted with appellee to afford him, to be with his dying brother in his last hours, and to comfort, by his presence, the bereaved mother. No press of business nor pecuniary interest could excuse his absence on such occasion. In the proper feeling of all men, not brutalized, the call upon him was superior to the engagements that usually occupy the time and absorb the minds of men. Having full knowledge of the situation, the duty of appellee to deliver promptly the message was correspondingly high. Damage for the breach of such a duty is not fifty cents. For so small a sum appellee, with its great facilities, procured in part by the State's aid, had contracted to do the appellant a great service. The appellant loses not the price, but the thing paid for, which was estimated in the judgment below, and on the pleadings, not excessively, at \$2,500.

In the *So Relle case*, 55 Tex. 310, it was held that injury to the feelings was actual damage, which could be recovered though no other was sustained. That authority was overruled in the elder Levy case, only in so far as it is held that such damage alone would sustain an action. The two cases conflict in but this one point. We find no case, except *So Relle*, which holds that a party may come into court solely to redress an injury to his feelings. Such injury is not in the name, person or property ; but if to either of these an actionable injury is done, the complaining party may then recover, as actual damages, compensation for the proximate results of the wrongful act. When injury to the feeling is such result, it forms an element of the actual damage. *Railway Company v. Randall*, 50 Tex. 261 ; *Field on Damages*, 76 ; *Craker v. Railway Company*, 36

Wis. 657; *Smith v. Overby*, 30 Ga. 241; *Smith v. Pittsburg, etc., R. Co.*, 23 Ohio St. 17; Cooley on Torts, 646; 1 Suth. on Damages, 17, 18.

The petition disclosed a good cause of action, sufficient, if the facts averred were proved, to sustain the judgment rendered. If the facts averred were not proved, the motion for new trial should have been granted. If the action of the court in overruling that motion was not satisfactory to the appellee, he ought to have excepted, have caused a statement of facts to be embraced in the record, and have assigned error.

The judgment of June 26, 1884, arresting that of May 2, 1884, was erroneous, and will be reversed, and as that of May 2 is sustained in the only particular in which it is complained of, it will be reinstated, 5 Leigh, 388; *Hoggland v. Cothren*, 25 Tex. 346; and these orders be certified below for observance. It is so ordered.

REVERSED AND RENDERED.

Chief Justice WILLIE did not sit in this case.

ON MOTION FOR A REHEARING.

STAYTON, Associate Justice: This action was brought to recover damages for a breach of contract made by the parties to this action. The contract fixed upon the appellee the duty to perform certain services for the appellant, services public in their nature by reason of the nature of the employment which the appellee had voluntarily assumed, and for a violation of this duty, the appellee became liable to the appellant for whatever damages necessarily resulted, or which, from the nature of the contract and the known purpose for which the service was sought, were likely to accrue by reason of its breach.

The sole ground on which a rehearing is asked is, that damages compensatory in character are not given by the law for an injury to the feelings, directly resulting from a breach of contract or violation of duty; that damages resulting from such grounds are only recoverable when a case is made authorizing exemplary damages; that damages for injury to the feelings are punitive and never compensatory.

We have no disposition to enter into a discussion of the vexed question, whether the recognition of a rule which gives to an individual damages for punitive or exemplary purposes, and not merely as compensation for an injury received, is in harmony with a rational administration of the laws pertaining to the adjustment of rights between man and man.

It may be, and is most likely true, that the whole doctrine of punitive or exemplary damages has its foundation in a failure to recognize, as elements upon which compensation may be given, many things which ought to be classed as injuries entitling the injured person to compensation. The elements of injury for which damages compensatory may be given, vary in their character. To some of these the means for ascertaining the compensation which ought to be given is such that it may be fixed with almost mathematical certainty, while as to others, this degree of certainty cannot be reached.

At some periods the tendency was to restrict the recovery of damages compensatory, to such matters as were susceptible of having attached to them an exact pecuniary value, the dollars and cents lost as the result of a breach of contract or tort. At the present time, however, the fact that it may be found difficult to ascertain the exact amount of compensation which ought to be made for an injury resulting necessarily from the act of another, is not considered as any sufficient reason why compensation should not be given.

The question, in any case, is, has injury necessarily resulted to the person, property or reputation of one person from the act of another, violative of a right secured by contract or the general law of the land? If so, the act violative of right, being the proximate cause of the injury, the person who thus suffers injury is entitled to damages to compensate him for this, whatever may be the elements which make up the injury and form the basis for damages. If one person be unlawfully wounded by another, the damages he may recover as compensation will not be restricted to such sums of money as may be equal to the value of time lost, money necessarily expended in treatment with a view to

recovery, and other like matters ; but the physical pain resulting from the wounding enters into the estimate as a factor calling for compensation, more or less, as the pain may have been slight or severe, or of short or long duration.

If such a wounded person's condition, resulting from the unlawful act, be such as to cause mental suffering, this is also to be taken into estimate. Why? Is it because the mental suffering is brought about by a maimed or disabled condition, for which of itself compensation must be made? Certainly not; physical pain is no more real than is mental anguish.

If one person is unlawfully so wounded by another that he loses a limb in consequence thereof, and this is attended with physical pain, compensation must be made for the latter injury, simply because it is the necessary, natural or probable result of the unlawful act. If, in addition to the physical pain, the maimed condition of the same person, or the circumstances under which he is placed by the wounding, bear as necessary, natural or probable fruit, mental suffering, this is also matter for which compensation must be given ; but the right to compensation for the one injury has not its foundation in the existence of the other.

Each of these elements for damages goes back to a common source of right of compensation—the act of the violator of a right secured by contract or the general law of the land ; and whatsoever necessarily results to the injured person from the act so violative of his right must give legal claim for compensation ; and his right to this cannot be made dependent upon the motive with which the unlawful act is done, nor upon other circumstances which are ordinarily held to be sufficient to authorize the imposition of damages termed punitive or exemplary.

In *Railway Company v. Isaac Levy*, 59 Tex. 563, it was held that one who had not fixed upon a telegraph company, by contract, the duty to deliver a message, could not maintain an action for damages for the failure to promptly deliver it, upon the mere averment that such failure had caused him mental distress. In that case authorities were

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cited illustrating the extent to which courts and elementary writers had gone in support of the rule that mere mental suffering was not sufficient to enable one person to maintain against another an action, based on negligence, when neither by contract nor positive law was a duty fixed to do for him the act alleged to have been negligently performed.

It was not necessary in that case that we approve or disapprove of all that was asserted to be the law in the authorities cited, nor were we then called upon to declare whether mental suffering resulting from the negligent performance of a duty, fixed by contract or positive law, as an element entitling the injured party to damages compensatory. In *Railway Company v. J. T. Levy*, 59 Tex. 543, which was somewhat similar in its facts to the case before us, it was held that the action could be maintained, and that the injured party was entitled to recover any damages which the proof might justify, besides such sum as was paid for sending the message, and that he might recover exemplary damages, if the negligence of the telegraph company was wilful or gross.

There was, however, no intimation in that case that damages, such as are termed exemplary, were the only damages the plaintiff might recover other than the sum paid for the transmission of the message; but it was suggested that it would be necessary for the plaintiff to show a case entitling him to actual damages to entitle him to recover damages exemplary. The case last referred to was before this court a second time, and there is much in the opinion then given which we deem inconsistent with the rules of law applicable to such cases. We see no reason to doubt that the case now before us was correctly disposed of by the original opinion, which more fully considers all the questions involved in the case, and the motion for rehearing will be overruled.

It is so ordered.

MOTION OVERRULED.

NOTE.— See INDEX to this and to previous volume, title “Damages.”
See note to *W. U. Tel. Co. v. Edsall*, *post*.

GULF, COLORADO AND SANTE FE RAILWAY COMPANY v.
L. J. MILLER.*

Texas Supreme Court, Feb. 14, 1888.

(69 Tex. 739.)

FAILURE TO DELIVER TELEGRAM.—LIMITING LIABILITY.—UNREPEATED
MESSAGE.

A stipulation in a telegraph blank, freeing the company from liability for mistakes or delays in transmission or delivery of unrepeated messages, does not cover failure to deliver after transmission.

Charge to jury on question of negligence held sufficient and proper.

Evidence tending to show that with proper diligence the company could have delivered the telegram, held properly admitted.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Neill*, vol. 1, p. 352; *Womack v. W. U. Tel. Co.*, vol. 1, p. 454; *Hibbard v. W. U. Tel. Co.*, vol. 1, p. 62; *W. U. Tel. Co. v. Fenton*, vol. 1, p. 198; *Bartlett v. W. U. Tel. Co.*, vol. 1, p. 45; *W. U. Tel. Co. v. Blanchard*, vol. 1, p. 404; *W. U. Tel. Co. v. Fontaine*, vol. 1, p. 229.

APPEAL from District Court, Washington county; McFARLAND, J. : Action for damages for failure to deliver telegram. Appeal by defendant below from order denying motion for new trial.

Garrett, Searcy & Bryan, for appellant.

Bassett, Muse & Muse, for appellee.

ACKER, J.: Appellee brought this suit to recover damages for the failure to deliver a telegraph message sent by his wife from Sealy, Texas, to him at Brenham, informing him of the serious illness of their child, and requesting his presence at Sealy. The message was delivered to appellant's agent at Sealy about 2:30 P. M., and the charge for trans-

* This name is given as "Wilson" in the official report. The correct name is said, however, to be "Miller."

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mitting and delivering was prepaid. The distance from Sealy to Brenham is about 30 miles. The message was received at Brenham a few minutes after it was delivered to appellant's agent at Sealy. The message was not repeated. Appellee was at his home in Brenham all afternoon of the day the message was sent, but it was not delivered to him until in the afternoon of the next day, after the child was dead, when he called for it at appellant's office in Brenham. The message was written on a blank, furnished by appellant for that purpose, at the top of which, and preceding the message, there was printed matter containing the following stipulation :

"It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, whether happening by the negligence of its servants or otherwise, beyond the amount received for sending the same."

In regard to this contract, the court charged the jury: "Under such a contract, the defendant, its agents and employés, would be bound to use such care and diligence as were reasonably adequate to a faithful discharge of the obligation assumed ; and the failure to deliver the message with reasonable diligence, that is, with such care and diligence as a prudent man would exercise in a matter of equal importance to himself—if that fact has been shown, makes a *prima facie* case of negligence, which would cast on the defendant the burden of proof to justify, excuse, or mitigate such an apparent breach of duty ; and the fact that the sender did not pay to have the message repeated constitutes no defense to an action for the failure to deliver it to the party to whom it was addressed."

This charge is complained of as erroneous, because, as contended here, "the appellant had the right to limit its liability by contract, and the court erred in instructing the jury that the fact that the sender did not pay to have the message repeated constitutes no defense to an action for the failure to deliver it to the party to whom it was addressed."

Treating the conditions or stipulations, printed upon the blanks furnished by appellant, and upon which it requires all messages to be written, as a contract, we are to determine whether the stipulation here invoked is reasonable and binding to the extent of affording protection to appellant against damages resulting from the negligence of its agents and employés in failing to deliver the message.

If the plaintiff in this suit were seeking to recover damages for error committed in transmitting the message, we would be relieved of all difficulty upon this question; for while the authorities are numerous, very respectable, and well supported by sound reason, that hold such stipulations void, this court has held that, where the action is brought to recover damages for error in transmitting, the failure of the sender to have the message repeated exonerates the company from liability for damages, unless the injury was caused by the misconduct, fraud, or want of due care on the part of the company, its servants or agents. *Western Union Telegraph Company v. Neill*, 57 Tex. 283; *Womack v. Western Union Telegraph Company*, 58 Tex. 176. But we can conceive no reason in support of the requirement that the message shall be repeated where the injury results from a failure to deliver, and we, therefore, hold, with the great weight of authority, that the condition or stipulation here insisted upon as an exemption of the company from liability for damages resulting from a failure to deliver, is not reasonable nor valid nor binding. *Hibbard v. Tel. Co.*, 33 Wis. 564; *Tel. Co. v. Graham*, 1 Colo. 204; *Tel. Co. v. Fenton*, 52 Ind. 5, 6; *True v. Tel. Co.*, 60 Me. 18; *Birney v. Tel. Co.*, 18 Md. 341; *Bartlett v. Tel. Co.*, 62 Me. 217; *Tel. Co. v. Blanchard*, 68 Ga. 309; *Berry v. Cooper*, 28 Ga. 543; *Tel. Co. v. Fontaine*, 58 Ga. 433; *Clarke v. Meixsell*, 29 Md. 222; *Sweatland v. Tel. Co.*, 27 Iowa, 432.

That such condition or stipulation, in so far as it undertakes to exempt the company from liability for negligence of servants and employés is void, is too well settled to require discussion here. (See authorities collated in note on page 44,

vol. 8, American and English Corporation Cases.) Upon the question of negligence, and the degree of negligence, that would exonerate appellant from liability, the court gave the following instruction:

“The question of diligence is one to be determined by the jury from all the facts and circumstances in evidence; and if you believe from the evidence that the defendant, through its messenger at Brenham, or otherwise, used such care and diligence as a prudent man under like circumstances would use in his own behalf to find the plaintiff and deliver the message, and failed through no fault of the defendant company, or its agents or employes, then you will find for the defendant.” Considered in connection with other portions of the charge relating to the same question, we think this instruction sufficient, and that the court did not err in refusing to give the special charge requested by appellant. We cannot perceive how appellant’s rights could be affected injuriously by the jury finding it guilty of a particular degree of negligence, unless it was made to appear that the finding of gross negligence influenced the jury in fixing the amount of damages, and it is not contended by any proper assignment of error that it did. The question of negligence was for the jury, and if they found that the failure to deliver the message was caused by the negligence of appellant’s servants, such negligence, without regard to its degree, would make appellant liable for actual damages in such amount as the jury might find from all the facts and circumstances in evidence. *Railroad Co. v. Hewitt*, 67 Tex. 478.

There was evidence upon which the jury might well find negligence, and this court will not disturb a verdict unless it is unsupported by evidence, or is clearly against the great preponderance of the evidence; especially so, when there is nothing in the record indicating that the jury were affected by any improper motive or influence in returning their verdict.

After appellee had testified in his own behalf, on cross-examination, he was interrogated by counsel for appellant,

with much particularity, in regard to the place he had lived at, and the different occupations he had pursued during the six years he had resided in Brenham, and the fact was elicited that he had conducted a grocery business in his own name for about eight months in the town of Brenham. On re-examination he testified, without objection, that while he was engaged in the grocery business he kept and used printed cards, letterheads and envelopes, and produced specimens of each, which were offered in evidence in his behalf. Appellant objected to the introduction of the cards, letterheads and envelopes, upon the ground that "the same were not competent evidence, and impertinent and irrelevant to any issue in the cause." The objection was overruled, and appellant insists that this ruling was error. The witness having testified, without objection, that he kept and used the cards, letterheads and envelopes, we do not think the ruling here complained of could have operated prejudicially to the rights of appellant.

Appellant sought to excuse the non-delivery of the message upon the theory that appellee was an obscure person, but little known, and who could not be found by repeated inquiries for him by its messenger. The most material question in the case was whether appellant's servants had exercised due diligence in attempting to deliver the message, or whether their failure to deliver it was due to their negligence. Pertinent to this question were the inquiries as to appellee's places of residence, and the business he had been engaged in, in Brenham. The evidence showed that the means ordinarily used to advertise and make known one's residence and business had been employed by appellee, and tended to show that, had appellant's servants used the diligence demanded by the exigency indicated in the message, they could have found some one who would have given information by which they would have been enabled to deliver the message.

The record contains nine assignments of error, none of which are presented in the brief. The brief is made upon five propositions, without reference to the order or numbers

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of the assignments of error, several of which are too general to require consideration. If the rules do not specifically require that assignments of error relied upon shall be inserted and presented in the brief, they certainly contemplate that such shall be done. In this case, we have had much difficulty in determining upon which assignment of error each of the several propositions was predicated, but have considered every question that we deem at all material, and conclude that the judgment of the court below should be affirmed.

Affirmed.

NOTE.—See note to *W. U. Tel. Co. v. Edsall*, *post*.

See INDEX to this and to previous volume, title "Limiting Liability."

This case is cited in *W. U. Tel. Co. v. Cooper*, *post*.

JAMES B. McALLEN v. WESTERN UNION TELEGRAPH
COMPANY.

Texas Supreme Court, March 20, 1888.

(70 Tex. 243.)

FAILURE TO TRANSMIT TELEGRAM.—DAMAGES.—MENTAL DISTRESS.

Imaginary sorrows, or mental distress, the probability of which was in no way made known to the agent or operator at the transmitting office, form no basis for recovery against a telegraph company for failure to transmit a telegram.

The bruising of the sender's person by riding on a buckboard, such riding being made necessary by the failure of his father to meet him with a carriage, as requested in the telegram, could not have been reasonably anticipated as the result of failure to transmit.

Facts held to not indicate gross negligence, wilful wrong or oppression so as to entitle the sender of the telegram to exemplary damages.

Cases of this series cited in opinion: *Daniel v. W. U. Tel. Co.*, vol. 1, p. 650; *Candee v. W. U. Tel. Co.*, vol. 1, p. 99.

APPEAL from judgment of District Court, Cameron county, sustaining demurrers and dismissing complaint in

action for damages for delay of telegram. Commissioner's decision.

Facts stated in opinion.

F. E. Macmanus, for plaintiff in error.

Wheeler & Rhodes, for defendant in error.

MALTBIE, Presiding Judge: James B. McAllen brought suit against the Western Union Telegraph Company to recover damages, actual and exemplary, growing out of the alleged tortious conduct of the company's agent in failing to send a telegram from San Antonio to Edinburg, in Hidalgo county. The petition contains a minute statement of all the facts, and is subdivided into paragraphs, numbered from 1 to 18, inclusive. To this petition there is a general demurrer, and a special demurrer to each of its subdivisions. The demurrers were all sustained; and, the plaintiff declining to amend, the petition was dismissed.

It was alleged that the plaintiff, being in San Antonio, about the 2nd of August, 1883, applied to defendant's agents at that place to know whether there was a telegraph office at Edinburg open for business, and was informed that there was. Plaintiff thereupon wrote a telegram, and addressed it to his father, John McAllen, at Edinburg, directing that the family carriage be sent to Pena to meet this plaintiff, which defendant's agent undertook to transmit for the sum of eighty-five cents, which was paid. It is averred that plaintiff remained in San Antonio for six days, awaiting an answer to his dispatch; that he called at defendant's office, and was told that no reply had been received. At the expiration of six days he went to Pena. The carriage had not arrived. It was only seventy-five miles from that point to the home of his father, by the usual traveled route; but no conveyance could be obtained, and he was compelled to take passage in a "jerkey" and on a buckboard by way of Rio Grande City to Edinburg, a distance of 200 miles.

It was alleged that, when plaintiff realized the fact that the family carriage had not been sent to Pena, his mind became oppressed with dreadful forebodings as to the cause of its not being there. He had learned, while in San Antonio, that his father was sick, and this was the occasion of the dispatch for the carriage, though the defendant was not informed of this or any other reason for the sending of the message. During the entire journey from Pena, plaintiff's mind was racked with doubt and uncertainty as to his parent's condition ; suffering the most excruciating agony for fear some dreadful calamity had befallen him. It was further averred that plaintiff was severely battered and bruised by the jars and jolts of the jerkey and buckboard, inflicting great physical pain and suffering upon him. The actual expense of the journey was laid at \$69. It was alleged that the telegraph office at Edinburg had been closed for more than a month before this, and that it was or ought to have been known to defendant ; and that soon after sending the message it did learn this fact, and the further fact that the message could be transmitted by a more circuitous route ; that it failed to send the message, and concealed the fact from plaintiff ; that, at the time plaintiff applied to know whether there was a telegraph office at Edinburg, he was very anxious upon the subject ; and that, after defendant's agent had answered that there was, he took the precaution to ask if he was sure, and was answered contemptuously, "We ought to know." It was averred that these several acts were done for the purpose of injuring, annoying, and oppressing the plaintiff ; that they were wilful and malicious on the part of the defendant's agent ; and that defendant, after being fully informed of the same, ratified and adopted all the acts of its agent, and thereby became liable to respond in punitive as well as actual damages.

The exception to the eighth paragraph of the petition was that it was not stated whether the damages claimed therein were actual or exemplary ; the amount alleged being \$10,000. We think this section of the petition objectionable in not stating the character of damages claimed, and for that reason subject to the exception urged.

After this exception was sustained, there only remained a claim for \$69 actual and \$10,000 punitive damages. The claim for punitive damages will be considered hereafter.

It is contended that while the wrong complained of grew out of a contract, that it is in fact a tort. Let it be conceded. In cases of tort, the rule is, the wrongdoer shall be answerable for all the injurious consequences of his tortious acts, which, according to the usual course of events and general experience, were likely to ensue, and which, therefore, when the act was committed, he may reasonably be supposed to have foreseen and anticipated. 1 Sutherland on Damages, 74. Under this rule, had it been a fact that no other conveyance could be procured from Pena to Edinburg except such as those upon which plaintiff took passage, it could not have been anticipated that, in the usual course of such a journey, plaintiff's posteriors would become bruised or lacerated to such an extent as to cause serious physical pain; at all events, no damages were specially laid on account of such pain and suffering, and, if plaintiff desired to insist upon such, he should have amended his petition in that particular. There is no such gross negligence, wilful wrong or oppression shown in this case as in our opinion, would entitle the plaintiff to exemplary damages if the suit had been brought against defendant's agent instead of the defendant. Such being the case, any question of ratification on the part of defendant becomes unimportant; for, if the agent would not be responsible for punitive damages, the principal could not be. At the time plaintiff contracted with defendant's agent for the transmission of this message, he did not make the fact that his father was in a perilous condition known, and any mental suffering that may have been occasioned in consequence of the failure to deliver the telegram, that was induced by the sickness of plaintiff's father, could not have been contemplated by defendant's agent, nor was it the necessary or usual consequence of a failure to perform such a contract, and hence no damages on this account can be recovered. *Daniels v. W. U. Telegraph Co.*, 61 Tex. 452; *Hadley v. Baxendale*, 9 Exch.

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341; *Candee v. W. U. Telegraph Co.*, 34 Wis. 471; 1 Sutherland on Damages, 74.

In this case it seems that the plaintiff's mental anguish was not the result of any real or adequate cause. It does not appear that the father was dead, or in such a condition as demanded the personal presence or attention of his son. On the contrary, the sorrows of the plaintiff were imaginary, and were caused by the failure on the part of the father to send the carriage to Pena, which the affectionate son attributed to the fact that the father was dead, or too dangerously ill to attend to ordinary business, when in truth the failure was due solely to the fact that no request to send forward the carriage had been received. The deduction of the son was not logical, or at all events the occurrence might have been well accounted for on some other hypothesis than the disability of the father.

If grief or sorrows produced by things unreal, mere figments of the brain, are held to give a cause of action for a breach of contract or a tort, an individual of a somber, glowing imagination, would often be entitled to large damages on account of mental suffering, while others of a buoyant fancy, for the same breach of duty, would not be entitled to anything; and damages, instead of being measured by the rules of law as applied to the real facts, would largely depend upon the fertility of the imagination of the suitor. After the demurrers to the petition were sustained, no cause of action remained, and the judgment of dismissal was correct, and should be affirmed.

Affirmed.

NOTE—See INDEX to this and to previous volume, title “Damages.”
See note to *W. U. Tel. Co. v. Edsall*, *post*.

J. P. LOPER v. WESTERN UNION TELEGRAPH COMPANY*Texas Supreme Court, May 11, 1888.*

(70 Tex. 689.)

DELAY OF TELEGRAM.—DAMAGES.

In Texas, where damages accruing from a personal injury to the wife are community property, held, that in an action brought by the husband for damages to his wife caused by the negligent delay of a telegram addressed to her and announcing the serious illness of her son, defendant's demurrer to the petition was improperly sustained, the petition containing, among others, the following allegations:

That the agent to whom the telegram was delivered was informed of the relationship between the sender and the addressee; that the message, although showing urgency on its face was delayed more than a day in transmission; that on account of the delay the addressee was unable to see her son alive or even to attend his funeral; that she suffered thereby both pecuniary and physical damage and mental distress.

Case of this series cited in opinion: *Stuart v. W. U. Tel. Co.*, *ante*, p. 771.

APPEAL by the plaintiff from a judgment of Eastland county District Court, sustaining a demurrer to the plaintiff's petition in an action by a husband for damages for negligently delaying a telegram to his wife.

The facts appear in the opinion.

Davenport & Truly, for plaintiff in error.

Stemmons & Field, for defendant in error.

GAINES, Associate Justice: This is a writ of error to a judgment sustaining a general demurrer to plaintiff's petition. The main issuable facts in the case, as shown by the allegations in the petition, are that Mrs. S. J. Loper is the wife of the plaintiff, that M. A. Truly was her son, and that on the 2nd of October, 1882, he was lying dangerously

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ill at the town of Mineral Wells, in Palo Pinto county; that plaintiff and his wife then resided at Whitesboro, in Grayson county; that on the day above named, in obedience to a special request of Mrs. S. J. Loper theretofore of him made, and for her special information and guidance, the said M. A. Truly, assisted by others, to wit, Dr. Fowler, D. W. Staton, Thos. Johnson, and others to the same end acting, prepared for transmission and delivery by defendant a message in writing of great importance and urgency to said S. J. Loper, substantially as follows, to wit.:

“MINERAL WELLS, October 2, 1882.

“*To Mrs. S. J. Loper, Whitesboro, Tex.:* Come immediately. I am very sick.

“M. A. TRULY.”

That the message was delivered to the agent of defendant at Mineral Wells at 4 P. M. on the day of its date, and was paid for; that the agent was informed of the relationship between the sender of the message and the person to whom it was addressed; that, on the 2nd of October, plaintiff and his wife were at their residence in Whitesboro, which was within six hundred yards of the office of defendant at that place; that this was well known to the defendant's agent at that point; that the message could have been delivered within half an hour from the time of its receipt by the company's agent at Mineral Wells; that, if it had been so delivered, Mrs. Loper would have gone to her son, and, by the usual course of travel, would have reached him by 2 P. M. the next day, and that, at all events, she could have reached Millsap (an intermediate point on her route) about midnight on October 3, and would have met the funeral cortege with the dead body of her son. It is further alleged that, by reason of the negligence of defendant, the dispatch was not delivered until after 6 o'clock on the evening of the day last named; that she took the next train going towards her destination, and did not arrive at Millsap until the evening of October 4th, “when she learned that her son was dead, and had been carried to Eastland for burial, and that he had died at Mineral Wells about

noon on the previous day." It is also averred that she telegraphed to Eastland to delay the burial, and immediately proceeded to that point, but failed to arrive until after the body had been interred. The petition also contains very full allegations as to the business of the company, the means of travel between Whitesboro and Mineral Wells, as to the hardship and inconvenience suffered by Mrs. Loper in being compelled to travel on a freight train during a part of the way in order to expedite her journey, and as to her mental sufferings caused by being deprived of the privilege of being with her son in his last moments, and of attending the burial of his body. Both actual and exemplary damages are claimed. The elements of actual damages alleged are cost of telegram, expenses of travel, impairment of health from hardships of travel, and mental suffering.

Upon what ground the court sustained the demurrer to the petition the record does not disclose. We are of the opinion that the facts alleged in the petition bring the case substantially within the rules announced by this court in the case of *Stuart v. Western Union Telegraph Co.*, 66 Tex. 580. The allegations first quoted above show that the parties who sent and paid for the message acted at the instance and request of plaintiff's wife, and for her use and benefit. This shows a contract on her part with the company. They also show that the relationship between the sender and the addressee was made known to the messenger, and that he was informed that the message was urgent and important; that there was a negligent failure to deliver it promptly; and that, by reason of this, she was deprived of the consolation, at least, of attending the burial of her son, and that in consequence she suffered great mental distress. The *Stuart* case was very carefully considered, and the previous decisions of the court were fully reviewed. The opinion therein delivered must be held the law of this court upon the questions there decided. It follows that the ruling of the court below cannot be sustained, unless we should hold that plaintiff cannot recover for the dam-

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ages which have resulted to the wife. It is held that damages accruing from a personal injury to the wife are community property (*Ezell v. Dodson*, 60 Tex. 331), and that for the mental suffering of the wife, as an element of such damages, a recovery may be had at the suit of the husband. *Gallagher v. Bowie*, 66 Tex. 265.

Appellee insists that the petition does not show that the damages which are sought to be recovered were contemplated by the parties at the time the message was received by the defendant's agent. But we think otherwise. It is alleged that agent was informed that the addressee and the sender of the dispatch were mother and son. The summons itself was urgent, and the face of the dispatch showed the sender was very sick. The agent might reasonably have anticipated that the son's life was in danger; and that, if the message was not delivered, the mother would suffer distress by being deprived of the consolation of seeing him in his last sickness, and of attending his burial. The message differs from that in the case of *Stuart v. Western Union Telegraph Co.*, *supra*, in form, but not in substance.

It is also insisted that it appears from the petition that the plaintiff's wife could have been at her son's burial but for the fault of the railroad, and that, therefore, the petition is insufficient. To this it must be answered that we think it is affirmatively shown that, if the message had been promptly delivered, the wife would have arrived before the burial; so that any subsequent default on the part of the railroad company, in failing to make connections on the trip actually made, would not affect the case.

The allegations in regard to the death and burial of the son are probably insufficient if a special exception had been interposed. They are quoted in the statement which is set forth in the opinion. The facts of the death and burial should have been directly averred. We think, however, the reasonable intendment from the averments is that he died about noon on the 3rd of October, and had been buried when his mother arrived at Millsap. We therefore conclude that

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these allegations are sufficient on general demurrer. *Burke v. Watson*, 48 Tex. 117.

Because of the error of the court in sustaining the demurrer to the petition, the judgment is reversed, and the cause remanded.

Reversed and remanded.

NOTE.— See INDEX to this and to previous volume, title “ Damages.”
See note to *W. U. Tel. Co. v. Edsall*, post.

THE WESTERN UNION TELEGRAPH COMPANY v. S. M.
COOPER.

Texas Supreme Court, Oct. 23, 1888.

(71 Tex. 507.)

FAILURE TO DELIVER TELEGRAM.— DAMAGES.— DUTY TO CUSTOMERS.

In an action against a telegraph company, based upon the failure to deliver a telegram to a physician calling him to attend the sender's wife in confinement, her mental sufferings are an element of actual damages.

In an action not under the statute relative to actions by parents for death of a child, the death of the child before birth and consequent mental suffering of the parents, *held*, not a proper element of damage.

The mental distress of the husband can have been only reflected and he could not recover therefor.

If the wife's pain and distress were increased by the fault of the telegraph company, that would be a proper element of damages, but the aggravated suffering must be kept distinct from what she would have suffered any way.

If the physician could not, in fact, have received the telegram, if promptly delivered, in time to be present at the birth, no recovery could be had, and the jury should have been so charged.

Information received by the messenger at the physician's office and reported to the receiving operator was admissible.

Information conveyed between the operators at the transmitting and the receiving offices, not communicated to plaintiff or his wife, was not admissible.

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The physician lived near the receiving office, which the messenger knew.

Held, that going twice to the physician's office in search of him was not the full duty of the messenger.

Cases of this series cited in opinion: *Stuart v. W. U. Tel. Co.*, *ante*, p. 771; *So Relle v. W. U. Tel. Co.*, vol. 1, p. 848; *Gulf, &c. Co. v. I. Levy*, vol. 1, p. 536; *Gulf, &c. Co. v. J. T. Levy*, vol. 1, p. 543; *Gulf, &c. Co. v. Miller*, *ante*, p. 781.

APPEAL from District Court, Johnson county.

Action for damages for failure to deliver a telegram presented by the plaintiff to a telegraph company, for transmission to a physician, summoning him to attend the plaintiff's wife in child-birth. The wife was delivered of a still-born child. It was alleged in the petition that by reason of the failure to deliver the telegram, and so of the physician's absence, the wife suffered more pain than she otherwise would; and the death of the child was attributed to the same cause. Damages were asked for mental suffering of both plaintiff and his wife.

Appeal by defendant below, from judgment rendered on a verdict awarding plaintiff \$2,000 damages.

Stemmons & Field, for appellant.

Crane & Ramsey, for appellee.

COLLARD, Judge: Appellant claims that its demurrers to plaintiff's petition should have been sustained because injury to feelings disconnected from all actual personal injury are exemplary damages, and the facts alleged are not sufficient to recover exemplary damages.

The very question raised here was before the Supreme Court in the case of *Stuart v. Western Union Telegraph Company*, and the court, after discussing the *So Relle* case, 55 Tex. 310, and the two *Levy* cases, 59 Tex. 543, 563, the case of *Hays v. The Railroad*, 46 Tex. 272, and other authorities, use the following language:

"But it is claimed that the mental is an incident to the bodily pain, and that without the latter the former can not be considered as actual damages. In cases of bodily injury

the mental suffering is not more directly and naturally the result of the wrongful act than in this case—not more obviously the consequences of the wrong done than in this case. What difference exists to make the claimed distinction? That it is caused by and contemplated in doing the wrongful act is the principle of liability. The wrong-doer knows that he is doing this damage when he afflicts the mind by withholding the message of mortal illness as well as by a wound to the person.”

The conclusion derived from the opinion in the case, from which the foregoing extract is taken, is that injury to feelings caused by a failure to deliver a message relating to domestic affairs, where the failure is the result of negligence on the part of the company or its servants, is an element of actual damage. The same principle was decided by the Commission of Appeals in the case of *Miller v. G. C. & S. F. Ry.* (erroneously styled in the reports *Wilson v. G. C. & S. F. Ry. Co.*), 69 Tex. 739, and it was held that the right to recover would not depend upon the degree of negligence causing the injury. If the inexcusable negligence of the defendant's servants is found to be the proximate cause of the injury, damages may be recovered commensurate with the injury.

2. The husband is the proper party to bring suit for such injury to his wife. She is not a necessary party. *The Texas Central Ry. Co. v. Burnett*, 61 Tex. 638; *San Antonio Street R. R. Co. v. Helm*, 64 Tex. 147.

3. We do not think the death of the child before birth, and the grief or sorrow occasioned thereby, can be an element of damages in this character of suit. If it is made to appear from the testimony that Mrs. Cooper suffered more physical pain, mental anxiety, and alarm, on account of her own condition, than she would have done if Dr. Keating had been in attendance upon her, and the failure to secure his services is shown to be due to the want of proper care on the part of defendant's servants, whose duty it was to deliver the message, a fair and reasonable compensation should be allowed for such increased pain and mental suffer-

ing; but the death of the child, the bereavement of the parents, and their grief for its loss, cannot be considered as an element of damages. Such damages are too remote. They are the result of a secondary cause, and ought not to be allowed to enter into a verdict. This is not an action under the statute by the parents for the death of a child, and if it were, injury to the feelings of the parents could not be a basis of a recovery by them. 3 Wood on Railway Law, 1538, and note 3. Injury to the mother alone, her physical pain and mental suffering, because of her own condition, would be a proper consideration; and it would be correct to allow proof that the child was still-born, if such fact tended to show that the labor was thereby prolonged, and her suffering so increased.

4. It is impossible to see upon what principle the husband can claim damages for injury to his feelings. His suffering could only be from alarm and sympathy for his wife's suffering. His distress is merely a reflection from her distress, and that might be very considerable, but it is too remote and consequential. She is allowed to recover in this suit, or rather he is, under the forms of law, on account of her injuries of body and mind. To allow him damages for the same injuries would be to allow two recoveries upon the same cause of action. We know of no authority that would justify such a conclusion. The person who suffers the injuries proximately resulting from the wrong done, and such person alone, is entitled to compensation, except in cases where death results, and the cause of action is made to survive to the relatives by virtue of a statute. The husband can sue for such injuries to his wife, but he cannot recover on his own account for his anxiety and sympathy.

5. Dr. Cooper having shown himself competent to testify as an expert, could give his opinion as to whether the child would have been born alive if he had received medical assistance in time. The death of the child was a proper inquiry, if it tended to prolong labor, as above explained, notwithstanding there could be no damages for its death, and consequent loss of services, in this action.

6. The correspondence by wire between the operatives sending and receiving the message, not communicated to Dr. Cooper or his wife, would not be legitimate evidence. George S. Stewart, the sending operator, received a telegram from the receiving operator that Dr. Keating had gone to the country. The question and answer were both properly excluded by the court. The fact that Dr. Keating had gone to the country could not be established in this way.

7. Any information the messenger received at the drug store as to the whereabouts of Dr. Keating, and the communication of such information to the receiving operator at Cleburne, would be admissible upon the issue of negligence or not on the part of the operator and messenger in failing to deliver the message. Hence the messenger ought to have been allowed to state, if he would, that he was told at the drug store where Dr. Keating kept his office, while attempting to find Keating, that he was gone to the country. This was error in excluding his statement to that effect.

8. The court in its charge referred to the operator at Cleburne as the person charged with the duty of delivering the message, and stated that, if he "made no effort to deliver" the same, or "used so little care to deliver it," as to satisfy the jury "that he was indifferent," etc.

The charge is criticised by appellant on the ground that the operator was not required to deliver the message; that this was the duty of the messenger. While we think the objection hypercritical, the charge would have been clearer if the court had then instructed the jury to the effect that if defendant's servants, whose duty it was to deliver the message, used so little care, etc. Under the facts of the case it would not be proper to hypothecate a charge upon the supposition that "effort" had been made to deliver the message. The message was sent by the operator, and the messenger went twice to the office of the plaintiff with it, and, failing to find him, made no further effort to find him, and whether he was negligent and indifferent in regard to the delivery of the message, whether there was negligence of

the company's operator in failing to do her duty, were questions for the jury, and should have been decided without the supposition that "no effort" had been made to perform such duties.

9. The charge of the court distinguishing the increase of suffering caused by the non-attendance of Dr. Keating from the pain she would have suffered if he had attended her was a correct and necessary distinction. If the servants of the company were in fact negligent, and by reason of such negligence the pain and suffering of Mrs. Cooper were aggravated and prolonged, she could only recover for such aggravated and prolonged suffering, as distinguished from the suffering she would have encountered in case there had been no such negligence, and Dr. Keating had arrived in time to have waited on her.

10. The court should have given a special charge asked by defendant, to the effect that, even if there was negligence on the part of defendant's servants in delivering the message, yet if, by the exercise of proper care on their part, it could not have been delivered in time for Dr. Keating to have reached the patient, and assisted in the delivery of the child, plaintiff could not recover damages for the pain and suffering claimed. The facts justified the giving of such a charge. It may be a question whether, if the message had been delivered as soon as it could have been by the use of necessary diligence, Dr. Keating could have arrived at Mrs. Cooper's bedside in time to have delivered her. The question should have been submitted to the jury.

11. It was not error to refuse an instruction asked by defendant: that "if the messenger went to Dr. Keating's office, and failed to deliver the message because of his absence, and went a second time to his office, about noon of the same day, *and could not* deliver it by reason of Dr. Keating's absence, such facts would excuse defendant from failure to deliver the message, and in such case the jury should return a verdict for the defendant for all the damages claimed, except the price paid for the tele-

gram.” The court correctly refused the charge. Going to Dr. Keating’s office was not the extent of the messenger’s duty. His residence was close by, he was well known in the town, and the messenger knew him, and knew where his residence was. He had been in the country, but had returned before the message was received at the telegraph office. He says he had left word where he could be found, and that he and his wife were in readiness to attend upon Mrs. Cooper when called, and could have driven there in two hours. The messenger had an important telegram for him, the confinement in labor of a patient, and only called at his office. It certainly would not have been correct, under such circumstances, for the court to have instructed the jury that such effort alone ended the duty of the messenger.

12. Again, the defendant asked the court to instruct the jury “that, if a party has a known place of residence and a known place of business in a city, it is no part of defendant’s duty to hunt said party upon the streets of the city; and the failure of defendant’s messenger to hunt the party on the streets is no evidence of negligence on the part of defendant.”

The court refused the charge. It would have been error if it had been given. The messenger did not go to the residence of Dr. Keating. If he had gone there, he might have learned where he was, certainly that he was not in the country. He only went to the office on two occasions—when the message was received, and then after an interval of two hours. He should have used reasonable diligence to deliver the message, even if that would require him to go upon the streets to find him. What such diligence was would depend upon the circumstances, of which the jury were the exclusive judges.

13. Defendant asked the court to charge the jury as follows: “The plaintiff in his petition states that the message was promptly transmitted from Grandview to Cleburne. There is no question before you as to any delay of the message at Grandview, or any other point, prior to its reaching

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Cleburne.” The jury should have been told that there was no complaint or question about delay at Grandview. The petition did allege, as stated in the requested charge, that the message was immediately sent from Grandview; and there was evidence of delay in sending it from that place,—a delay of one half hour. The charge was upon a material point, and should have been given as to the delay at Grandview.

Other assigned errors, not disposed of in the foregoing opinion, are that the court should have granted a new trial because of the insufficiency of the evidence to support the verdict. Of that we do not express any opinion.

For the errors committed and noticed above, we report the case to be reversed, and remanded for a new trial.

Reversed and remanded.

NOTE.—See INDEX to this and to previous volume, titles “Duty to Customers,” “Damages.”

See notes, vol. 1, pp. 79, 58; vol. 2, p. 616.

See note to *W. U. Tel. Co. v. Edsall*, *post*.

THE WESTERN UNION TELEGRAPH COMPANY v. H.
SHEFFIELD & SON.

Texas Supreme Court, Oct. 26, 1888.

(71 Tex. 570.)

DELAY OF TELEGRAM.—NOTICE OF URGENCY.—CONTRIBUTORY NEGLIGENCE.—DAMAGES.

A telegram in the language “You had better come and attend to your claim at once,” delivered to a telegraph company by a bank for transmission to a firm of merchants, sufficiently indicated the urgency of the message to charge the company with notice to its agent of such urgency and need of haste.

The result of the delay of the message being that creditors of the persons against whom the addressee, plaintiff, had the claim referred to in the

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telegram obtained attachments against the debtor, and upon sale under the attachments the property brought less than the attachment debts. *Held*, that the fact that the estimated value of the property was sufficient to pay both the prior claims and that of plaintiff did not impose upon the latter the duty of buying the property and discharging the prior liens.

Held, that the plaintiff's measure of damages was the amount of his debt with interest and the cost of the message.

Cases of this series cited in opinion: *Daniel v. W. U. Tel. Co.*, vol. 1, p. 650; *Stuart v. W. U. Tel. Co.*, *ante*, p. 771; *W. U. Tel. Co. v. Brown*, vol. 1, p. 461; *Edsall v. W. U. Tel. Co.*, vol. 1, p. 715; *Manville v. W. U. Tel. Co.*, vol. 1, p. 92; *Turner v. Hawkeye Tel. Co.*, vol. 1, p. 208; *Candee v. W. U. Tel. Co.*, vol. 1, p. 99; *Tyler v. W. U. Tel. Co.*, vol. 1, p. 14; *Beaupre v. P. & A. Tel. Co.*, vol. 1, p. 141; *W. U. Tel. Co. v. Reynolds*, vol. 1, p. 487; *Daughtery v. Am. Un. Tel. Co.*, vol. 1, p. 588; *Loper v. W. U. Tel. Co.*, *ante*, p. 790.

APPEAL from District Court, Marion county—W. P. McLEAN, Judge.

This suit was brought by the appellees, H. Sheffield & Son, in the District Court of Marion county, to recover of appellant actual and exemplary damages for delay in transmitting the following telegram:

“October 27th, 1886.

“To H. Sheffield & Son, Lodi, Texas: You had better come and attend to your claim at once. [Signed], W. T. ATKINS.”

Appellees allege that the said message was delivered to appellant's agent at Jefferson, Tex., by W. T. Atkins, the cashier of the National Bank of Jefferson, Tex., at 3.30 P. M. of October 27, 1886, and was not delivered to appellees, Sheffield & Son, until 8 o'clock A. M. on October 28, 1886; that Lodi was only nine miles from Jefferson, Tex., and that appellees, the Sheffields, were in Lodi from the date of sending said message up to the time of its delivery to them; that they were merchants doing business in said town, and were well known there, and were well known to appellant's agent in said town; that the failure to transmit and deliver the said message was caused by the gross and wilful neglect of appellant and its said agent.

Appellees' basis of damages, as claimed, is that they held three notes of Jones, Edgeworth & Sellers, one for

\$677.74, of date July 29, 1886, payable September 15, 1886, with interest at 1 per cent. per month from maturity ; and one for \$523.85, dated August 31, 1886, payable 60 days after date, with interest at 1 per cent. per month from maturity ; and one for \$472.41, dated September 6, 1886, due in 60 days from date, with interest from maturity at 1 per cent. per month ; an open account, held and owned by appellees against Jones, Edgeworth & Sellers, for \$1,000 ; and that because of the gross negligence they ask judgment in exemplary damages in the sum of \$2,500, in addition to the actual damages claimed by them. Appellees allege that the three notes mentioned by them were deposited with the National Bank of Jefferson for collection as they matured, and with instructions to carefully guard the interests and rights of appellees ; that the bank became possessed of information of the failing condition of Jones, Edgeworth & Sellers on the day of the delivery of the message to appellant's agent at Jefferson, and its cashier, W. T. Atkins, sent said telegram to appellees to apprise them, so that they could take steps to secure their said debts ; that Jones, Edgeworth & Sellers had, at the time of the delivery of the message to appellant's agent at Jefferson, property, real and personal, of the reasonable value of \$10,000 over and above all exemptions, more than sufficient to pay appellees' debts.

Appellees further allege that about 12 o'clock on the night of October 27, 1886, creditors of Jones, Edgeworth & Sellers, namely, J. H. Bemiss, W. J. Sedbury, and R. Ballauf & Company and others, sued out writs of attachment, amounting, with probable costs, to the sum of \$10,000 ; which attachments were, at or about 7 o'clock in the morning of the 28th of October, 1886, levied by the sheriff of Marion county, Texas, on all the property of said firm, Jones, Edgeworth & Sellers, real and personal, in Marion county, Tex. ; that the personal property has been sold under said attachments at public auction, and the amount realized therefrom is insufficient to pay off the balance due upon said attachments, and that the real estate of said Jones, Edgeworth & Sellers is insufficient to pay off the bal-

ance due upon said attachment suits, and that the said property so levied on and sold was the only property owned by the said Jones, Edgeworth & Sellers, and that the seizure and sale thereof have exhausted their assets, and they are now insolvent; that, if said telegram had been promptly transmitted and delivered, appellees would have instituted suit, sued out an attachment prior to the other attaching creditors, and have made their said debts out of said Jones, Edgeworth & Sellers; that they made demand in writing of appellant for the damages sued for herein, within 60 days, and that no part thereof has been paid.

Appellant, answering, pleaded; (1) A general demurrer; (2) a special demurrer that the allegations in plaintiff's petition were insufficient in law to recover exemplary damages; (3) a general denial. The court overruled the general demurrer, to [which action exceptions were taken by appellant. It sustained the special exception as to exemplary damages, and in open court all claim upon the open account was withdrawn by appellee.

A trial of said cause thereafter on the 16th day of June, 1888, was had, which resulted in a judgment against the appellant for the sum of \$1,684.40, with interest at 8 per cent. per annum from the 28th of October, 1886, and all costs of suit. Appellant's motion for new trial was overruled and appeal perfected.

Stemmons & Field, for appellant.

Charles A. Culberson, for appellees.

WALKER, Associate Justice. The questions involved in this appeal have received much attention from the courts of this State, and the case may be determined by the application of principles which have been recognized from time to time, and so often that they may be followed without question.

The first and second assignments of error put in issue the sufficiency of the message itself to give notice of its purpose and importance.

The message, "you had better come and attend to your claim at once," addressed to the plaintiffs from Jefferson, indicated with reasonable certainty to the telegraph operator the facts (1) that plaintiff had a claim of some pecuniary nature; (2) that the claim should be attended to at Jefferson; (3) that the matter was urgent, "at once;" and (4) loss would probably follow want of such attention, which might be prevented by obeying the call made in the dispatch. This was sufficient to disclose that the object was to enable plaintiffs to attend to a claim due them, and that loss might result from a failure to transmit the message with promptness.

The second assignment of error further complains at the refusal of the court to instruct the jury, at request of appellant, "that unless they find and believe from the evidence that defendant knew from the message, or from the facts communicated to it at the time it accepted said message, that the object of said message was to enable plaintiffs to collect their debt from Jones, Edgeworth & Sellers, the loss of said debt cannot be estimated by them in arriving at the damage done plaintiffs."

The rule in *Hadley v. Baxendale*, 9 Exch. 341, adopted in Texas, for the measure of damages, and applied to telegraph companies in their work, is: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may be fairly and reasonably considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as to the probable result of the breach of it."

The last clause in this citation is further explained or enlarged in *Baldwin v. U. S. Telegraph Co.*, 45 N. Y. 750, cited by the court in *Daniel v. W. U. Tel. Co.*, 61 Tex. 457. "The damages given by way of indemnity have been the natural and necessary consequences of the breach of

contract in the minds of the parties, interpreting the contract in the light of the circumstances under which it was made; and when a special purpose is intended by one party, but is not known to the other, such special purpose will not be taken into account in the assessment of damages for the breach." In other words, when applied to this case, the telegraph company should not be chargeable with any intent or purpose of which it is not informed, either by the terms of the message or otherwise.

The charge asked was intended to limit the "special purpose" to the collection of the claim against Jones, Edgeworth & Sellers, and appellant insists that any less information would not place such claim within the contemplation of the parties when the message was delivered to the operator. The terms "special purpose" and "notice," used in the definitions above, should receive reasonable interpretation, with reference to the subject to which they are applied. So far as would be important to the telegraph company, it would be sufficient, to caution it against probable loss, that it be informed that the message related to a pecuniary claim which was in danger and needing attention. It is elementary that by *notice* is included knowledge of and means of knowing the fact.

That the claim was against the particular firm was and could have been of no concern to the telegraph company. No greater or other care would have been anticipated to protect a claim against one firm than any other, in absence of any other fact. That the message was for the special purpose of enabling the plaintiffs to attend to a money claim at Jefferson was a sufficiently specific designation of the importance and purpose of the message, and this was evident from its terms.

The natural consequences of failure to give at once the attention to the claim can be considered as within the contemplation of the parties.

The court probably would have been justified in charging the effect of the terms used in the dispatch. This was not done. The jury were instructed that, in order to recover,

the plaintiffs must show "that defendant's agent was apprised from the language of the message that its prompt transmission was of urgent pecuniary importance to plaintiffs." Again, that the defendants "are not liable for damages (beyond the price paid for sending the message) for a failure to send and deliver in time, unless they are apprised and put upon notice, by the sender, of the urgency and necessity of promptness in its transmission and delivery. They must be notified by the sender in some way of the fact that a want of promptness will result in injury to the party interested in the same."

Again, the jury were further instructed that if, among other things, "you find that defendant's agents receiving and transmitting the same had notice that it was important to plaintiffs that said message be sent through and delivered without unnecessary delay," then the plaintiffs would be entitled to recover.

On the other hand the jury were instructed "that if you find that said message was not sufficient on its face to put the agent who received it for transmission on notice of its import, and that it involved probable injury, if not promptly sent and delivered, * * * you will find for defendant."

From these extracts from the general charge of the court, it is manifest that the jury were clearly informed of the importance to be attached to the meaning of the message, and of the necessity of their finding in it evidence of its purpose, and of the importance of its prompt delivery. The instruction asked by the defendant was properly refused. It exacted a minuteness of detail unnecessary for the information of the company of the nature and extent of the interest involved in the transaction. *Daniel v. W. U. Tel. Co.*, 61 Texas, 457; *Edsall v. Same*, 63 Texas, 677; *Stuart v. W. U. Tel. Co.*, 66 Texas, 583; *W. U. Tel. Co. v. Brown*, 58 Texas, 174; *Loper's case*, 70 Texas, 689; *U. S. Tel. Co. v. Wenger*, 55 Penn. St. 267; *Manville v. W. U. Tel. Co.*, 37 Iowa, 220; *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 251; *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 460; *Candee v. W. U. Tel. Co.*, 34 Wis. 480; *Tyler, Ullman & Co. v. W. U.*

Tel. Co., 60 Ill. 439; *Beaupre v. Pac. & Atl. Tel. Co.*, 21 Minn. 158; *Squire et al. v. W. U. Tel. Co.*, 98 Mass. 237; *Parks v. Alta Cal. Tel. Co.*, 13 Cal. 422; *W. U. Tel. Co. v. Reynolds Bros.*, 77 Va. 179; *Daughtery v. W. U. Tel. Co.*, 75 Ala. 170-174; 1 Sedgwick on Dam., 7 ed., pp. 231-239. These cases have been examined. There is much diversity as to the rule of consequential damages. As stated above, the decisions of our own State have been adhered to, and they follow the great weight of authority, in number at least, of the courts.

The third assignment is to the refusal of the court to give the special charge asked by the defendant: "If the jury find and believe from the evidence that plaintiff had a levy of his attachment on the property of Jones, Edgeworth & Sellers, sufficient in value to satisfy the same and the other attachments levied prior to plaintiff's attachment, and suffered the prior attaching creditors to purchase said property at public sale at less than the value of said property, they should then find for the defendant, except for the amount paid for transmission of said message, and interest thereon at the rate of eight per cent. per annum, from the date of payment."

There is no evidence to any unreasonable sacrifice of the property at the sheriff's sale, nor is it shown that the appellees themselves bought the stock of goods. Indeed, there are only the isolated facts that the goods seized were estimated at \$12,000 in value, that there were prior attachments upon the goods to nearly \$8,000, and that the sheriff did not realize sufficient to pay the prior liens.

The court had charged the jury that "if it appears that plaintiffs were in a position and condition to have made their debt out of said property, and failed to do so, then for so much as they could have saved out of said property they cannot recover."

It is elementary that a party claiming damages must not be in fault in contributing to them by his own want of proper care; and such care must extend to the protection from further loss after the act complained of. But this rule

must be rationally applied. It is not required that everything possible must be done to prevent or limit the extent of the loss. It is not shown that the plaintiffs had the means, or could have commanded them to advance the prior claims; nor is it shown to have been the reasonable duty of the plaintiffs, from the condition of their business, to have done so, if they had had the means. There is nothing to show that the money realized upon the sheriff's sale was not the reasonable cash price of the stock sold, notwithstanding the estimated larger value. A party is not required to invest further, in order to secure himself against the consequences of a breach of contract by which he suffers injury. *I. C. R. R. Co. v. Cobb, Christy & Co.*, 64 Ill. 142.

The fourth assignment is not well taken, in view of the construction already given, that, "before plaintiffs can recover for such damage, it must appear from the evidence that, had the message been promptly transmitted and delivered, plaintiffs could and would have secured and collected the debt they claim to have lost, or a part thereof." As to the sufficiency of the testimony, there is no issue made as to the existence of a cause for attachment against the debtors. This conceded, the issue was as to the effect of the delay upon the ability of the plaintiffs to avail themselves of the means present of making their debt. The testimony develops that in reasonable probability they could have made the debt in attachment proceedings, or by purchase of the stock of the debtors. The activity shown to have been exerted, the means of travel between the places, and the preference obtained by others through the delay, were passed upon by the jury, and they were required to find from all the testimony that but for the delay in transmission of the message the debt would not have been lost. It can not be said that the jury found their verdict without evidence.

The verdict was: "We, the jury, find for the plaintiff the sum of \$1,684.40, with interest at 8 per cent. per annum from October 28, 1886." This sum was evidently obtained by adding the interest (which was 12 per cent.) upon one of the notes, which was overdue, to the aggregate of the notes

and the cost of the message. The form of the verdict is of little importance in finding 8 per cent. per annum interest from the date of the note for which recovery was had. The measure of damages in like cases is the amount of loss, with such interest added. It will not vitiate the verdict that the interest was not computed, and the amount named as the damages.

It is held: (1) The message, "You had better come and attend to your claim at once," imparted notice of its purpose, and the importance of its prompt delivery, so as to bring such matters into the contemplation of the parties in the contract for the transmission of the message. (2) That the duty of carefulness would not have been more fully indicated to the telegraph company by the insertion therein of the name of the debtors, in absence of testimony showing otherwise. (3) The law does not impose upon a creditor the duty of further investment of his money to secure himself against loss for the breach of a contract by which such loss is caused. It is not, therefore, an act of negligence that the appellees did not buy it at the sheriff's sale or discharge the prior liens, although the estimated or real value of the property was in excess of the prior liens, sufficient to have paid their notes, in absence of testimony to their condition as to their means to do so, and testimony showing it their duty under the circumstances, as ordinarily careful and prudent men, to do so. (4) The measure of damages, upon the facts found by the jury, is the value of the notes, to which is added the cost of the message, if such be the extent of loss shown, with 8 per cent. interest to the day of the trial.

Finding no error in the record, the judgment below is affirmed.

Affirmed.

NOTE.—See INDEX to this and to previous volume, title "Contributory Negligence."

See note, vol. 1, p. 207.

See note to *W. U. Tel. Co. v. Edsall*, *post*.

This case is cited in *Brown v. W. U. Tel. Co.*, *post*.

Telegraph Co. v. Brown.

WESTERN UNION TELEGRAPH COMPANY v. J. M. BROWN.

Texas Supreme Court, Nov. 13, 1888.

(71 Tex. 723.)

DELAY OF TELEGRAM.—MENTAL DISTRESS.

The addressee sued the telegraph company for damages for delay in transmission of a telegram announcing the death of his brother. The injury alleged was mental distress. *Held*, that a demurrer to the complaint should have been sustained, special notice to the company or its operator of the relationship of the parties and so of the alleged distress as a probable consequence of delay, not being alleged in the complaint.

Case of this series cited in opinion: *Daniel v. W. U. Tel. Co.*, vol. 1, p. 650.

APPEAL by defendant below from a judgment of the District Court, Hopkins county, overruling demurrer.

Stemmons & Field, for appellant.

Leach & Templeton, for appellee.

WALKER, Associate Justice: This is an appeal from a judgment for \$275 in favor of appellee against appellant. The suit was brought the 15th day of March, 1887, by Brown, to recover of the appellant, the Western Union Telegraph Company, \$10,000 damages for delay in transmitting and delivering to him a telegram sent to him from Hallville, Tex., on the 11th day of December, 1886, by one Wilson Livingston, in following language:

“HALLVILLE, Texas, Dec. 11, 1886.

“*J. M. Brown, Sulphur Springs*: Willie died yesterday evening at six o'clock. Will be buried at Marshall, Sunday evening.

[Signed],

“WILSON LIVINGSTON.”

That Livingston acted as his agent in sending the message, and that by "Willie," named in said message, was meant Willie Brown, a brother of appellee, and that the price paid for sending said message was paid by appellee in the following manner: That the sum of 45 cents paid to defendant for transmitting and delivering the said telegram was money belonging to the estate of said Willie Brown, one-third of which plaintiff owned as an heir, and the other two-thirds by payment to the other two heirs, there being no administration, nor need of any.

The plaintiff alleged that the dispatch was not delivered until noon of the 12th December, 1886, and by reason of said delay, caused by the wilful neglect and failure of defendant to transmit and deliver said message, he was prevented from being present at the burial of his brother, whom he had raised and had cared for from childhood, and from receiving the consolation and condolence of his sister in his grief; whereby he suffered great disappointment, grief, and mental anguish, etc.

Defendant answered by general demurrer, special demurrer, and general denial. The demurrers were overruled, to which defendant excepted.

The exceptions were: "Because the petition on its face failed to state any cause of action in this that plaintiff sues for an injury to his feelings in tort, he being the addressee of the message, and no party to the contract under which said message was accepted and transmitted, and fails to state facts necessary to recover in tort."

"There is nothing in the alleged message to put the defendant upon notice that there was any relationship between the addressee and the said Willie Brown, or that anything except the mere announcement of the death of said Willie Brown was in contemplation by the defendant and the sender of said message at the time the message was delivered to and accepted by this defendant for transmission and delivery."

There is no allegation in the petition that the nature and importance of the telegram were made known to the tele-

Telegraph Co. v. Brown.

graph operator to whom the message was delivered otherwise than as conveyed by the terms of the message. The words of the dispatch were sufficient to notify the operator, as agent of the defendant, that a human being had died at Hallville, Tex., at 6 o'clock of the evening of 10th December, 1886; that the funeral of the deceased was to take place at Marshall on the evening of Sunday, December 12th; that the deceased was known to the person sending and to the person to whom the dispatch was sent; that intimate and familiar relations existed between them and the deceased from the use of the name "Willie," and even, perhaps, it may be understood that the message was an invitation to the funeral.

These suggestions intimated from the face of the message were sufficient notice of its importance to require corresponding care and diligence in transmitting it to its destination. Whatever damages might naturally result under such conditions from a failure to receive the message will be considered as being in contemplation of the parties to the contract; that is, between the plaintiff, having the right to the message, and the telegraph company. *Daniel v. Telegraph Co.*, 61 Tex. 456. But the message gave nothing to indicate that "Willie" was the brother of the plaintiff. The damages alleged are from the fraternal feelings outraged by the failure to hear of the brother's death in time to attend the funeral and condole with his sister.

Giving the most liberal meaning to the words of the message, they cannot be construed into a notice of the special matter of complaint in the petition.

The special exceptions should have been sustained, for which error the judgment is reversed.

Reversed and remanded.

NOTE.—See INDEX to this and to previous volume, titles, "Receiver or Addressee," "Damages."

See note to *W. U. Tel. Co. v. Edsall*, *post*.

This case is cited in *W. U. Tel. Co. v. Wilson*; *W. U. Tel. Co. v. Steele*, *post*.

THE WESTERN UNION TELEGRAPH COMPANY v. W. A. BROESCHE.

Texas Supreme Court, Feb. 12, 1889.

(72 Tex. 654.)

DELAY OF TELEGRAM.—LIMITING LIABILITY.—MENTAL DISTRESS.

A telegram having been delivered for transmission for the benefit of the plaintiff, who paid the charges, held immaterial whether or not the operator knew that the person who presented it for transmission was the agent of the plaintiff.

The fact that the terminal office was closed at the time a telegraph company accepted a message for transmission does not excuse delay in sending it.

Mental suffering is a proper element of damages in an action based on delay in transmitting a telegram.

The ordinary stipulation requiring repetition of messages will not protect a telegraph company in case of injury caused by delay in transmission.

Negligence of a telegraph company in failing to deliver a message promptly renders it liable for the direct and natural result of the default, without regard to the degree of such negligence.

Cases of this series cited in opinion : *Stuart v. W. U. Tel. Co.*, *ante*, p. 771 ; *Gr. C. & F. G. Ry. Co. v. Miller*, *ante*, p. 781.

APPEAL by defendant from judgment of District Court, Washington county. Commissioner's decision.

Stemmons & Field, for appellant.

Basset, Muse & Muse, for appellee.

ACKER, Judge : Appellee carried his wife from their home, near Burton, to Austin, for medical treatment, Dr. Hons, their family physician, accompanying them. The wife died at Austin on Sunday, July 17, 1887, and Dr. Hons and appellee went to appellant's office in Austin, between 6 and 7 o'clock P. M. on that day, and delivered to appellant the following message :

Telegraph Co. v. Broesche.

"Mrs. Broesche is dead ; will bring corpse on train to-night. J. M. HONS."

This telegram was addressed to appellee's brother-in-law, Hoffman, at Burton. Appellee paid the charges for transmitting the message, and left Austin with his wife's body that night by train, arriving at Burton about 1.30 A. M. on the 18th of July. The message was not delivered until about 8.30 A. M. the next day after it was deposited with appellant's agent in Austin, and some hours after the arrival of the corpse. This suit was brought by appellee to recover damages for the alleged negligent delay in delivering the telegram.

The trial was by jury, and resulted in verdict and judgment in favor of appellee for \$1,168, from which this appeal is prosecuted.

The court charged the jury to the effect that, if they found that Hons delivered the telegram to appellant's agent in Austin as alleged, they would then find whether or not, in so delivering it, Hons acted on behalf of appellee and at his request, and that, if they found Hons did not so act, they should return a verdict for appellant.

It is insisted that the court erred in giving this charge, in this, that it fails to submit the question whether appellant had notice that Hons was acting as appellee's agent in contracting for the delivery of the message. No special instruction was requested to cure the alleged omission here complained of. Besides, we are of opinion that it was immaterial whether appellant was notified that Hons was acting as agent for appellee or not. We can not see how this could have affected the rights, or influenced the conduct of appellant's agents. Appellee and Hons were together in the presence of the agent to whom the message was delivered at Austin. Appellee paid the charges for transmitting the message ; the operator to whom the message was delivered testified that he knew from the wording of the message that it demanded prompt delivery. Conceding that appellant was not informed that Hons was acting

as agent for appellee, we are unable to understand how the lack of this information affected, in any way, the conduct of appellant's agents. It does not appear that they would have done more or acted differently under the contract. Story on Agency, secs. 418, 420. We think, however, that appellant was sufficiently informed of the agency of Hons.

We think there was no error in the omission in the charge complained of by the third and fourth assignments of error.

The court charged the jury to the effect that the fact that appellant's office at Burton was closed at the time its agent at Austin received the message for transmission would be no defense for failing to transmit and deliver the message, and it is contended that the court erred in this charge.

We think the court did not err in giving this charge. The contract to transmit the message was made by appellant through its agent, who was fully authorized and empowered to make it; we do not think appellant can excuse its failure to perform the contract upon the ground that another one of its servants, acting under authority from appellant, had rendered the performance of the contract impracticable.

It is also contended that the court erred in charging that the jury might take into consideration mental anguish and suffering as elements of damage, if they should find for appellee. The point here presented has been ruled against appellant by several decisions of this court. *Stuart v. Telegraph Co.*, 66 Tex. 581-586.

It is also contended that the message having been written on a printed blank, containing a stipulation that appellant would not be liable in damages for delay in transmitting or delivering the message beyond the cost of transmitting, unless it was repeated, the court should have charged the jury that, if they found that the message had not been repeated, then they should return a verdict for appellant. We think the court did not err in refusing to give the special charge asked by appellant upon the stipulation contained in the printed blank. It has been decided that

the stipulation requiring messages repeated can not be invoked in defense of an action to recover damages for delay or failure in delivering the message. *G., C. & S. F. Ry. Co. v. Wilson* [Miller], 69 Tex. 739.

We do not think that appellee's right of recovery was dependent upon the jury finding appellant guilty of gross negligence, and we think the court did not err in refusing the special charge requested by appellant to that effect. Negligence by appellant in failing to deliver the message, without regard to the degree of such negligence, would render it liable for such damage as was the direct and natural result of such failure to deliver. *Ry. Co. v. Wilson, supra*.

Appellant requested the court to instruct the jury to the effect that appellee could not recover damages by reason of his failure to accomplish any purpose not shown by the face of the message, unless appellant had notice of such exterior purpose at the time the contract was made. The special instruction was refused, and this is assigned as error.

The court charged the jury that the appellee could only recover such damage as was the direct and natural result of the failure to transmit and deliver the message. The operator at Austin, to whom the message was delivered, testified that he knew from the message that appellee's wife was dead, and that they expected to convey her body to Burton by the train that night; and that, unless the telegram was delivered the evening he received it, the corpse would reach Burton before the telegram.

The purpose of appellee in informing Hoffman of the death, and the fact of carrying the corpse to Burton by train, was too obvious to require explanation. We think the special charge asked and refused was not called for nor authorized by the facts, and that the court did not err in refusing to give it.

It is also contended that the verdict is excessive, but, under the previous decisions of this court, we cannot say that it is. Mental anguish or distress being an element of

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actual damage which the law furnishes no rule for estimating, its measure is left to the discretion of the jury. Unless it appears that the jury have acted from passion, prejudice, or other improper influence, the verdict will not be vacated on the ground of excessiveness alone. We are of opinion that the judgment of the court below should be affirmed. *Affirmed.*

NOTE.— See INDEX to this and to previous volume, titles “Limiting Liability,” “Damages.”

See note to *W. U. Tel. Co. v. Edsall*, *post*.

This case is cited in *Brown v. W. U. Tel. Co.*, *post*.

THE WESTERN UNION TELEGRAPH COMPANY V. ERNESTINE SIMPSON.

Texas Supreme Court, March 26, 1889.

(78 Tex. 422.)

ERROR IN TELEGRAM.—BREACH OF CONTRACT TO SEND MONEY.—MENTAL DISTRESS.

The name of the place from which a telegram is transmitted is no part of the message, within the meaning of the repetition clause in telegraph blanks.

Mental distress is a proper item of damages in case of breach of contract to transmit money by telegraph, where it was the direct and natural result of the breach and the company was informed of the unusual importance of performance.

Case of this series cited in opinion: *Stuart v. Tel. Co.*, *ante*, p. 771.

ACTION for damages for breach of contract to deliver money sent by telegraph. Appeal by defendant from judgment for \$1,000 and costs, rendered at District Court, Galveston county. Commissioner's decision.

Wheeler & Rhodes, for appellant.

Waul & Walker, for appellee.

ACKER, Presiding Judge: Appellee's husband died in California, and she sent a message by appellant from Los Angeles, in that State, at 4 o'clock P. M., January 12, 1885, to her agent, R. A. Crossman, in Galveston, Tex., informing him of her husband's death—that she would leave there at 2 o'clock P. M. the next day, and requesting him to send to her \$200 by telegraph immediately. When this message was delivered to Crossman, between midnight and daylight on the morning of the 13th of January, it appeared to have been sent from San Francisco, instead of Los Angeles. Crossman went to appellant's office in Galveston, and was informed that the money could not be received by appellant before 9 o'clock A. M. At that hour, Crossman and his clerk, Bullock, went to appellant's office, made the application for the transfer, and delivered the \$200, and paid \$4.70 tolls to appellant's agents. The money was not received by appellee, and Crossman, being informed by message from her that she had not received it, remitted to her on the morning of January 14th, through the Wells-Fargo Express Company, another \$200, which she received in time to leave Los Angeles with the body of her husband at 2 o'clock P. M. on that day. This suit was brought on the 13th day of May, 1885, to recover of appellant damages for its failure to deliver the money as it had contracted to do. The petitions alleged, substantially, that appellee, being in great distress and need of money at Los Angeles, Cal., on the 13th of January, 1885, contracted,

to transmit the money, and which produced the mental anguish, distress, and mortification; that the telegram sent by her to Crossman on January 12th, requesting him to send the money, was no part of her cause of action, and that no damages were claimed by reason of any mistake in that message, but alone for the failure to transmit and deliver the money to her, as appellant had contracted to do. Appellee laid her damages at \$1,740.

Appellant answered by general demurrer, and special exceptions to so much of the petition as sought to recover damages for mental anguish. The answer also contained the following special defenses:

1. The stipulations in the printed contract under which appellee's first message was sent, limited its liability for damages unless the message was repeated, and exempted it from liability for damages unless the claim therefor was presented in writing within 60 days after the message was sent. It was averred that neither of these conditions had been complied with.

2. It was admitted that appellee's message, requesting the money sent, was sent by her from Los Angeles, but when it was delivered to appellee's agent, in Galveston, it appeared to have been sent from San Francisco, instead of Los Angeles. It was averred that this change in the name of the place from which it was sent was caused by an accident to which the business of telegraphy is liable at all times, without negligence upon its part, and which could have been guarded against by having the message repeated.

3. That when appellee's agent expressed to the agent of appellant his surprise that the message from appellee was headed San Francisco, instead of Los Angeles, and declared his belief that she was at Los Angeles, appellant's agent then suggested and offered to have the message repeated, but appellee's agent declined to have it repeated, and assumed all responsibility for any inaccuracy in the message, and made his written application to have the money transferred to San Francisco, which appellant did on that day; that the next day appellant discovered the mistake,

and immediately had the money transferred to Los Angeles. The answer admitted liability for \$206.33, and averred that the amount had been tendered to appellee's agent from whom it was received, on the 16th of January.

Appellant's special exception was overruled.

The trial was by jury, and resulted in verdict and judgment for appellee for \$1,000.

By the first assignment of error it is urged that the court erred in overruling the special exception.

We think it too well settled in this State to justify elaborate discussion here that mental anguish may constitute an element of actual damage for which compensation may be recovered upon breach of a contract, where such anguish is the direct and natural result of such breach. The liability rests upon the principle that the mental distress was caused by the breach of the contract, and was contemplated as a part of the consequences of such breach at the time the contract was entered into.

To authorize a recovery of damages for mental distress resulting from the non-performance of a contract for the payment of money, it must be alleged and proved that the party contracting to make the payment was informed at the time of making the contract of the peculiar condition and circumstances of the party for whose benefit the contract was made, which render the prompt performance of more than ordinary importance, that the party contracting to make the payment may anticipate the more serious consequences of the breach.

Appellee alleged that appellant was fully informed of her unfortunate surroundings and urgent need of money at the time the contract was made, and specifically set forth the circumstances brought about by appellant's failure to perform the contract, which circumstances, it was alleged, produced the mental anguish, distress and mortification.

We think the court did not err in overruling the special exception. *Stuart v. Tel. Co.*, 66 Tex. 581, 586.

Under numerous assignments of error it is contended that

appellee's cause of action arose on the mistake in transmitting her message of January 12th, which, when delivered to Crossman at Galveston, gave San Francisco as the name of the place from which it was sent, and that, by the terms of the contract under which it was sent, appellee could not recover unless she had the message repeated, and presented in writing her claim for damages within 60 days. Several special instructions upon appellant's theory were requested and refused, and the court charged the jury that the suit was not brought to recover damages by reason of the error in that telegram, but to recover damages for the alleged failure of appellant to send the money to Los Angeles, and that the stipulations in that telegram had no application to the suit.

Appellee expressly disclaimed any right of action upon the error in the name of the place from which her telegram of January 12th was sent, and based her action and right of recovery solely upon the contract to transmit the money, and its breach.

We think the court did not err in refusing to give the special instructions requested, nor in giving the charge complained of. The contract to send the message from appellee at Los Angeles to her agent at Galveston and the contract to send the money to appellee were separate and distinct undertakings, and that appellant so regarded them at the times they were respectively entered into is clear from the testimony of Chesley and Shultz, its agents at Galveston.

If this was an action brought to recover damages for appellant's negligence in erroneously giving the name of the place from which the message was sent we think it may well be doubted whether the stipulation requiring messages to be repeated would apply. When a telegraph company receives a message to be transmitted, calling for an important reply, the company knows that the reply would be unavailing unless the party who is to make it is informed of the place to which it should be sent. It is believed that the name of the place from which the message

is sent is not a part of the message; it is a fact peculiarly within the knowledge and keeping of the company, to be communicated to the party to whom the message is sent. The agent or operator at the receiving office must necessarily make known the place from which the message was sent in transmitting it. It is believed to be his duty to write upon the paper containing the message the name of the place from which it is sent. Scott & Jar. Law of Tel., sec. 181.

Appellant requested a charge to the effect that Crossman having good reason to believe that appellee was at Los Angeles, and not at San Francisco, as indicated by the message received from her, his negligence in failing to have the message repeated estops appellee from claiming damages in this suit. The special charge was refused, and this is assigned as error.

By the pleadings of appellee, and the charge given by the court, the first message from appellee to Crossman was eliminated from the case, and in so charging we have decided there was no error.

The court charged the jury to the effect that, if Crossman directed the money to be sent to San Francisco, appellee could only recover the \$200, with interest from the date of its delivery to appellant; but that, if Crossman directed the money to be sent to Los Angeles, and appellant negligently failed to send it to appellee at that place, and was apprised of the importance to her of receiving the money, and the probable consequences to her of the failure to deliver it, appellee would be entitled to recover. This charge made the right of appellee to recover depend solely upon the question of fact whether Crossman directed the money sent to one place or the other, without regard to the inducements or influences that may have controlled Crossman in giving such direction. We think this charge was certainly as favorable to appellant as the facts adduced upon the trial would justify.

Appellant's agents at Galveston testified that Crossman expressed his doubts as to appellee being in San Francisco

at the time he applied to have the money transmitted, and said he believed she was at Los Angeles, and that they offered to repeat the message, but he declined to have it done. On the same day, and about the same time that the money was deposited with appellant, Crossman sent through the hands of these same agents a message to appellee at Los Angeles informing her that he had sent the money, and she testified that she received his message the day it was sent.

Crossman testified that he told appellant's agents at the time he applied for the transfer of the money that appellee was not at San Francisco, but at Los Angeles, and that, if the money was sent to San Francisco, he did not think she would get it; that the agents replied that they never made mistakes like that; that they knew their own business; that if the money went at all it should go to San Francisco, and insisted that he should so make the application.

Bullock, Crossman's clerk, who was with him, and wrote the application for the transfer of the money, testified that he showed Mr. Shultz, who was in charge of the office, the telegram from appellee headed San Francisco, and asked to see the original telegram. Shultz told him they did not keep a copy. Crossman said it was impossible for appellee to be in San Francisco, and that he was satisfied she was in Los Angeles; that appellant's agent replied that the telegram was correct; that they made no mistakes; that it was under the orders of appellant's agents that he wrote the application for transfer to San Francisco, instead of Los Angeles; that it was not so written with Crossman's sanction, as he said he was satisfied she was at Los Angeles; that he suggested to Crossman that perhaps the money had to go first to San Francisco, and then be transferred to Los Angeles, and the application was made as directed by appellant's agents. These agents testified that they did not require Crossman to make the application for transfer to San Francisco; that they gave no directions as to the place the money should be transferred to.

Crossman and Bullock testified that appellant's agents did not propose to have the message repeated. It is evi-

dent from the fact that Crossman sent his message to Los Angeles informing appellee that he had sent the money, that he was morally certain that she was there, and not at San Francisco. Some influence must have operated upon him to induce him to consent to have the application made for transfer of the money to San Francisco, instead of Los Angeles, if it was in fact so made. If the application was written for transfer to San Francisco by direction of appellant's agents, when Crossman insisted that appellee was at Los Angeles, and that the money should be sent there, and the jury had so believed from the evidence, then we think appellant would have been liable, notwithstanding the application was in fact made for transfer of the money to San Francisco.

When appellant was informed by Crossman's conversation and acts that he believed appellee was at Los Angeles, notwithstanding the telegram from her when delivered to him appeared to have been sent from San Francisco, and appellant under the circumstances took no steps to inform itself further, we think it assumed the risk of the consequence resulting to appellee by the negligence of its agents in changing the name of the place from which the message was sent, if that change influenced its agents at Galveston to insist that the application should be made for the money to be transferred to San Francisco instead of Los Angeles.

The issue as to what constituted the contract under which appellant received the money is not made. No assignment of error is presented bringing the question to our attention, so that it can be passed upon here. There was no objection to the parol testimony introduced tending to show that the contract made was for transfer of the money to Los Angeles, notwithstanding the written application may in fact have been originally made for transfer of the money to San Francisco. The original application for the transfer of the money was used in evidence, and the name "San Francisco" was erased by a pen mark drawn across it, and the name "Los Angeles" written in its stead.

Chesley, appellant's manager at Galveston at the time

the application was made, testified by deposition that the application was made to transfer the money to Los Angeles, and wrote a letter to appellee proposing to return the money that had been deposited with appellant to be transferred to her at Los Angeles. This witness gave it as his opinion that the name of the place was changed from San Francisco to Los Angeles at St. Louis.

From the testimony of Crossman and Bullock, it is evident that they desired the money sent to Los Angeles, although they may in fact have written San Francisco on the application. We think the jury might have found from the evidence that the application was in fact made for transfer of the money to Los Angeles instead of San Francisco, notwithstanding the writing may have named San Francisco.

It is also contended that the verdict is excessive, but we cannot say that it is. The law furnishes no rule for estimating damages for mental anguish ; this is left to the discretion of the jury, and that discretion will not be controlled, or the verdict vacated, unless it appears from the amount for which the verdict is returned, together with other matters disclosed by the record, that the jury may have acted from prejudice, or other improper influence, rather than an honest desire to award adequate compensation for the injury.

Appellant was informed by the message which it received from appellee at Los Angeles, and delivered to Crossman at Galveston, as well as from information given to it by Crossman at the time the contract was made, that appellee was in a distant State, with the dead body of her husband, awaiting the receipt of the money to return to her home at Galveston. It was informed that she expected to leave Los Angeles at 2 o'clock P. M. on the day the money was placed in its hands, and it must be presumed that the contract was entered into with reference to, and in contemplation of, the consequences that would result to appellee by its breach.

That appellant might have delivered the money to appellee at Los Angeles on the day that it was received in time

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for her to leave at 2 o'clock P. M. on that day, is demonstrated by the fact that the express company transferred the money over appellant's wires on the 14th of January in time for her to receive it and leave Los Angeles at 2 o'clock P. M. on that day.

We find no error in the record requiring reversal, and are of opinion that the judgment of the court below should be affirmed. *Affirmed.*

NOTE.— See note to next case.

THE WESTERN UNION TELEGRAPH COMPANY v. R. S.
EDSALL.

Texas Supreme Court, June 14, 1889.

(74 Tex. 829.)

ERROR IN TELEGRAM.— DAMAGES.

The sender of a telegram, on presenting it for transmission, stated to the operator that the object of the dispatch was to get a dog to help drive sheep to his ranch from another designated county.

In transmitting, the name of the dog "Shep," was changed to "Sheep."

In consequence, the addressee drove a large flock of sheep to the designated place, many of which perished by exposure; as did also many of another flock, owing to the absence of the dog to drive them.

Held, that the company had sufficient notice of the importance of the message; and that the plaintiff properly recovered the actual loss sustained.

ACTION for damages caused by error in transmitting a telegram.

Appeal by defendant below, from judgment of District Court, Cook county, in favor of plaintiff. Facts stated in opinion.

Stemmons & Field, for appellant.

Potter & Hughes, for appellee.

HENRY, Associate Justice: This suit was brought by appellee to recover damages for the negligent transmission of a telegraph message by appellant.

The message directed to be sent read:

“Meet me immediately with two horses at Buffalo Springs. Bring Shep.”

As delivered it read:

“Meet me immediately with two horses at Buffalo Springs : Bring sheep.”

The message was sent from Gainesville, Tex., to Fort Griffin, Tex., and from there mailed to Throckmorton, Tex.

The plaintiff then owned and had on his ranch in Throckmorton county a flock of 2,500 head of sheep. He had just purchased a flock of about 1,300 head in Cook county, which he proposed to drive to his ranch in Throckmorton county. The message was sent on the 20th day of January to one Joel Butler, who was the servant of plaintiff, in charge of his sheep in Throckmorton county. “*Shep*” was a dog belonging to plaintiff, and in charge of Butler, trained in the management of sheep. The purpose of the dispatch was to have Butler meet plaintiff on the way between Cook county and Throckmorton county, in order that he might have his assistance, and that of the dog, in driving the purchased sheep (known as the West flock) to his ranch.

On account of the error in the dispatch, as delivered to Butler, “sheep,” instead of “Shep,” Butler at once drove the Throckmorton, or ranch, flock of sheep to Buffalo Springs.

It is charged that the consequences of the mistake occasioned damage to both flocks and additional expense.

That by reason of the greatly longer time required for Butler to reach Buffalo Springs with the sheep than it would have done with the dog, plaintiff was prevented from making connection or communicating with him, and for the want of his assistance and that of the dog, he was greatly delayed in driving the West sheep, and put to great additional expense, and that the longer exposure of

the sheep, and the more inclement weather on the last part of the route,—that from Buffalo Springs to the ranch,—the West sheep perished in great numbers; and that by reason of the ranch sheep being taken from their range, where they were well provided for, and driven to Buffalo Springs over a barren country, where they could not get feed, and were exposed to inclement weather, they perished in large numbers; and besides those of both flocks that survived were greatly injured and lessened in value; and that the dog would have greatly lessened the number of hands required, and, at the same time, have enabled plaintiff to complete the drive in a shorter time.

Judgment was rendered for plaintiff.

Appellant complains of errors committed by the District Court in not sustaining its exceptions to plaintiff's pleadings on the grounds:

1. Because they failed to charge that defendant had any notice of the object and purpose for which the telegram was sent, further than shown by the telegram, and, by it, there was no notice that the damages sued for would follow a breach of the contract in transmitting and delivering the telegram.

2. Because they show on their face that, in acting on the message as delivered, there was such contributory negligence on the part of the plaintiff's agent as precludes a recovery.

3. Because they do not show that defendant had any notice that plaintiff owned any sheep in Throckmorton county; that the dispatch did not give such notice, and no damages from that cause were in the contemplation of the parties when they made the contract.

4. Because the item of \$100 damages, or expense of driving sheep to and from the ranch to Buffalo Springs, is not an element of damage, because it was not in contemplation of the parties at the time the message was accepted for transmission.

Plaintiff alleges in his petition that when the dispatch was sent "he informed the agent of defendant, who was

then in its office, and in charge thereof, that he wanted to telegraph to Joel Butler requesting him to bring the dog, and meet him to assist in driving the sheep purchased by him in Cooke county to his ranch in Throckmorton county.

This allegation shows that direct notice was furnished defendant that the object of the dispatch was to get assistance for the purpose of driving sheep on part of the journey from Cooke county to Throckmorton county; and the telegram, as delivered, directing that the ranch sheep should be taken to Buffalo Springs, there can not be a question of want of notice in either case. When notice of the main fact was given, we think the defendant was chargeable with notice of every incidental fact that would attend the transactions that it could then have ascertained by the most minute inquiry. Notice of the main purpose was sufficient to put it upon inquiry as to the attendant details, and it is chargeable with all it could have learned by such inquiries. This rule, enforced in all cases, is emphatically applicable to telegraph companies.

The condensed methods of expression in use in their business requires them to take notice of whatever the dispatch suggests, and if they need fuller information on the subject, they should seek it, and if they do not do so, they must be held, as we have suggested, to have all the knowledge that such inquiries could have elicited. In this case, knowledge of the fact that the two herds were to be driven between known points, at a stated season of the year, would properly charge the company sufficiently with notice of the distances, character of the country, expense of driving, and effect of delay on sheep, considering the weather and other things incident to driving flocks of sheep over the routes; to make it responsible for damage growing out of such causes or conditions.

We are unable to see in what consisted negligence on the part of Butler, the servant of plaintiff, in obeying a plain command to him to take the flock of sheep to Buffalo Springs. The dispatch contained no word inconsistent

with that direction. It contained nothing to suggest a doubt of its entire accuracy. If he had entertained such a doubt, he had no means of removing it. The dispatch had been brought to him by mail from the end of the telegraph line, and, not having the means of immediately communicating with the sender, if that could have been required of him under any circumstances, he was under the necessity either of obeying or repudiating it. We do not think it can be fairly contended that, under the circumstances, it was not his duty to obey the message as he did.

Appellant complains that the court erred in its charges to the jury as follows:

1. In failing to submit to the jury the question of notice to defendant of any object to be accomplished by the telegram, further than shown by itself, and as to whether damages to the sheep were in contemplation of defendant when it received the telegram for transmission; and in failing to submit the question of contributory negligence.

2. In charging that plaintiff might recover for loss on the West flock between Buffalo Springs and plaintiff's ranch, because all the evidence showed that Butler reached said destination before plaintiff did, and plaintiff's loss was occasioned by his failing to meet Butler there.

In the main, these objections are the same as those raised upon the exceptions to the pleadings, and have no more merit in one view than in the other. Moreover, in so far as they complain of the omission to give charges, those given by the court being found unexceptional, the omitted charges, even if they had been correct, ought to have been brought to the attention of the court.

With regard to the objection to the charge as to damages for driving the sheep between Buffalo Springs and the ranch, based upon the evidence that Butler arrived at the Springs before plaintiff did, and that plaintiff's not finding him there at all was his own fault, we think that on this point the evidence shows that plaintiff sent a messenger to meet Butler at Buffalo Springs, and give him further instructions, consistent with the original pur-

pose, but, on account of Butler being impeded by the ranch sheep which he was driving, he was greatly delayed, leading to the messenger leaving the destination before he reached it. From the same cause Butler, when he arrived at the destination, could get no information, and as, for the want of food and shelter, the sheep under his control were being greatly injured, he, after waiting there a short time, prudently returned with the sheep to the ranch; from which it resulted that he was not at Buffalo Springs when plaintiff reached that point with the other flock, and no communication was established between the two until afterwards.

As the record now stands, owing to portions of it having been stricken out on motion of appellee, there is nothing to support the remaining assignments of error discussed in the brief of appellant.

We think the judgment ought to be affirmed.

Affirmed.

NOTE.— Upon a former appeal, this case is reported in vol. 1 of this series, page 715.

See note, vol. 1, p. 58.

In addition to this and the preceding nine cases, the following Texas cases upon the same general subject appear in vol. 1.: *So Relle v. W. U. Tel. Co.*, p. 348; *W. U. Tel. Co. v. Neill*, p. 352; *Womack v. W. U. Tel. Co.*, p. 454; *W. U. Tel. Co. v. Brown*, p. 461; *Reliance Lumber Co. v. W. U. Tel. Co.*, p. 466; *Gulf, &c. Co. v. I. Levy*, p. 536; *Gulf, &c. Co. v. J. T. Levy*, p. 543; *W. U. Tel. Co. v. Shotter*, p. 557; *Daniel v. W. U. Tel. Co.*, p. 650; *W. U. Tel. Co. v. Foster*, p. 740; *W. U. Tel. Co. v. Pells & Ray*, p. 857, note; *W. U. Tel. Co. v. Catchpole*, p. 862, note.

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BROWN V. THE WESTERN UNION TELEGRAPH COMPANY.*Utah Supreme Court, June 21, 1889.*

(6 Utah, 219.)

DUTY TO THE PUBLIC.—DELAY OF TELEGRAM.—RULES AND REGULATIONS.

A message in these words: "Send doctor on first train; Katy has broken her finger," was received at the terminal office in ample time, if promptly delivered, for the doctor to have gone that night to the place where his services were required. But because the message was received later than the hour prescribed by the rules of the company for the delivery of telegrams, it was not delivered until the next morning.

Held, that the question of the reasonableness of the rule was properly submitted to the jury, as was also the question whether or not the result to the patient would have been different had the message been promptly delivered.

Held, also, that the supreme importance of prompt and active conduct upon the part of the company's agents in delivering the telegram being manifest from its very reading, the degree of diligence required of the company was equal in importance to the emergency of the occasion, and this without any regard to rules and hours established by the company.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Broesche*, ante, p. 815; *W. U. Tel. Co. v. Sheffield*, ante, p. 802.

ACTION for damages for delay in delivery of a telegram.
Appeal by defendant below from judgment rendered in First District Court.

Bennett & Bradley, for the appellant.

L. R. Rogers and *Thomas Maloney*, for the respondent.

JUDD, J.: This is an action brought by the plaintiff against the defendant in the District Court at Ogden City. The facts of the case show that on the 8th of April, 1888, between 5 and 6 o'clock in the evening, the plaintiff, a girl about five years old, had her hand badly mashed, and to

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such an extent that her forefinger of the right hand was broken at the middle joint. It seems that she, together with other children, was engaged playing upon the turntable of the railroad at a station called Promontory, in Box Elder county, Utah Ter., about 50 miles north of Ogden City; that when her father discovered her injury,—there being no physician that could be reached nearer than Ogden City,—he at once telegraphed to that city for a physician. To this telegram he received an answer that the physician could not come. Immediately upon the receipt of the telegram from the physician he sent the following:

“PROMONTORY, April 8th, 1888.

“To J. R. Brown, Ogden, Utah: Send doctor on first train. Katy has broken her finger.
T. G. BROWN.”

This telegram was received by the agent of the defendant at Promontory, who was likewise the agent of the railroad, at 6.30 o'clock, Promontory time—7.50 o'clock, Ogden time. Trains left Ogden going west, one at 7 P. M. and one at 11.30 at night. This dispatch was not delivered by the company to Brown until about 7.35 A. M. the next day. The testimony sufficiently shows that if the dispatch had been delivered to Brown at Ogden, he would have procured a physician to go to Promontory, who would have left on the 11.30 train, and arrived at Promontory at 2 o'clock. As it was, no physician reached the plaintiff that night, and the next morning her father took her upon the train, and arrived at Ogden at 10 o'clock on the morning of the 9th. When the father arrived at Ogden he at once took her to the office of a physician and surgeon by the name of Bryant, who found, as he states, that the fore part of the finger, from where it was broken, was, to use his own language, “dead;” that by twisting the finger around, or by some other means not entirely described, the circulation had been strangled; and that he found it in such a condition that it was impossible to re-establish circulation, and that amputation was necessary, and he amputated it at the middle joint. The action of the plaintiff

against the defendant is founded upon the idea that if the dispatch sent to Brown had been delivered in proper time a physician would have arrived at Promontory about the hour of 2 o'clock that night after the accident, and that the finger, by proper surgical treatment, could have been saved, and the plaintiff saved of much pain and suffering. This theory of the case is put in issue by the defense, and the ground taken is, *first*, that the proof does not show that the final amputation of the finger was the result of any delay in procuring a physician, and that it was probably the result of the accident which so badly damaged the finger; and that in any event amputation would have been necessary, and that the delay and negligence, if any, of the defendant, was not the proximate cause of the loss of the finger, and the pain and suffering; and, therefore, the defendant alleges that it is not liable; and for further defense it sets up that the manager of the defendant company in charge of the office in Ogden had established certain rules with reference to the delivery of dispatches from that office, and that those rules were reasonable, and that, all other questions aside, it is not liable. It alleges and shows by the proof that, the day of the reception of this dispatch at Promontory and its transmission to Ogden City being Sunday, its office hours were from 8 to 10 o'clock A. M. and 4 to 6 P. M., and that on week days from 7.30 A. M. to 8 P. M. That this dispatch, being received at Ogden at 8 o'clock and 9 minutes, was more than two hours after the office hours established for this office, and, to use the language of the brief of the counsel for the defendant, "these hours being reasonable, the company was not bound to deliver the dispatch received outside of the hours, no matter what the consequences may have been."

So far as the first point of the defense is concerned — that is, "that the proof does not sufficiently show that the result to the plaintiff would have been different had the dispatch been delivered," — this court is content to observe that all those matters were submitted fairly, and under

proper instructions by the trial judge to the jury, and, the jury having found against the defendant, the rule of this court is that it will not disturb the verdict of a jury where the evidence tends to support it, and under that rule this case fails. But the more important question arises on the ground as to the right of the defendant to establish rules for its guidance in the delivery of telegrams. It will be remembered that this telegram was received at Promontory, and the money paid for its transmission to the Ogden office, and that it was transmitted in due time to the last-named office; and the only complaint, when the case is stripped of verbiage, is that the defendant company were guilty of negligence in failing to deliver this telegram when it reached Ogden City from that office to Brown, the person to whom it was sent; and the direct defense of the defendant is that it was received after its office hours, which it had the right to establish, and that therefore there was no negligence. In other words, the defendant says, "that we have the right to establish hours for the transmission and delivery of dispatches, and we have the right to judge of the reasonableness of those hours, and that, so long as we are within the observance of the rules and hours which we have established, we are guilty of no negligence;" the argument being that the public is bound to take notice of the hours and rules that "we have established for business." Can this contention be sanctioned, is the important question which arises in this case. Whether, if a telegram were tendered the company to be sent by them out of their office hours, they would be bound to receive and send it, is a question with which the court is not now dealing, and upon which it expresses no opinion; but we are of the opinion that, having received and transmitted this dispatch, the measure of diligence to be applied to the conduct of the defendant, with reference to its delivery, is not to be, and can not be, decided by any rules or hours that the company may see fit to establish. Whether in the individual case the rules of the company are or are not reasonable, or whether it is or is not guilty of negligence in failing to

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deliver a message, is a question the court will not allow the company to decide. It is a fundamental rule in the administration of remedial justice that courts claim and exercise for themselves the right to adjudge in each individual case as it may be presented, the question of whether the parties sued are or are not guilty of wrong, with reference to the particular transactions under investigation. Whether the rules established by the defendant are reasonable or not, as we have said, is a question to be decided by the court or jury, as the case may be, in each individual case as it arises. It will not do to say that because the company has the right to establish rules for its government, therefore those rules determine the question of negligence or no negligence. It must be remembered that this defendant, in offering its services to the public, and receiving the money of people for sending dispatches from one point to another, is, to say the least of it, occupying the position of a public institution. In the language of Chief Justice WAITE in the case of *Munn v. Illinois*, 94 U. S. 113: "When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest submit to be controlled by the public for the common good, as long as he maintains the use." This defendant company, by its invitation to the public to use its lines for the transmission of messages, impliedly grants to the public an interest in the use of its wires, and, having done this, like all other institutions of like character, its rules and regulations are at all times open to inquiry as to their reasonableness, and its conduct is at all times open to inquiry, as to whether it is guilty of negligence or not. We are of the opinion that the question in this case of the reasonableness of these rules of the company was properly submitted to the jury; and we are also of the opinion that the question of whether this company was guilty of negligence in failing to deliver the dispatch was properly submitted to the jury; and in both instances the jury found against the defendant.

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In order that there may be no misunderstanding as to the judgment of the court in the case, we lay down the following rule as applicable to the facts in the case: It will be observed that this dispatch was in plain, unambiguous language. It said: "Send doctor on first train. Katy has broken her finger." When that dispatch was received at Promontory for transmission, and when it was received at Ogden by the agents of the defendant, the supreme importance of prompt and active conduct upon the part of the defendant's agents in delivering that telegram was made manifest from its very reading, and we hold that the degree of diligence required of the defendant was equal in importance to the emergency of the occasion, and this without any regard to rules and hours established by the company, as testified to in this regard. It must be kept in mind that this company at Promontory, by its agent, received this dispatch, and received the money for its transmission, and that it was transmitted to the office at Ogden; that this dispatch was to the effect that a child was suffering with a broken finger; that it was important that a physician and surgeon be immediately sent; and to allow the defendant, upon the pretense that it was received out of its office hours, to let it lie there until 7.35 the next morning, and then to excuse it from delivery under such circumstances, would be the greatest injustice. It would be to put the public at the mercy entirely, or we may say the caprice and will, of public institutions, to which they are compelled to resort in the transaction of business. So far as the receipt and delivery of telegrams with reference to commercial transactions are concerned, we do not express an opinion, but we do not hesitate to say that when a dispatch shown to be received by the company for transmission, which upon its face demonstrates the importance of delivery, as in this case, the degree of diligence is to be in proportion to the exigencies of that case. Nor has the defendant the right to complain at this. It sets itself up as a transmitter of messages for the public, and it receives franchises from the State, in order that it may do

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business ; it receives money from the public for the transmission of messages, and, like all other institutions, it should be willing to deal with the public in a fair and just manner, and not undertake to screen itself behind mere office rules and hours, which in all probability are made for the mere convenience of the employés, and especially in cases like this, where human pain, suffering and deformation hang upon prompt action. Nor are these views new, but find ample authority in adjudged cases of high respectability. As a sample we cite the cases of *Telegraph Co. v. Broesche*, 10 S. W. Rep. 734, and *Telegraph Co. v. Sheffield*, id. 752. Other cases could be cited, but the foregoing are sufficient. The case was fairly submitted by the court to the jury, under instructions in some respects more favorable to the defendant than the law warranted, and we are satisfied that substantial justice has been reached, and the judgment of the court below will be affirmed, with the costs.

ZANE, C. J., and ANDERSON, J., concurred.

NOTE.—See INDEX to this and to previous volume, titles, “Duty to Customers,” “Rules and Regulations.”

See note, vol. 1, p. 79 ; vol. 2, p. 616.

HUGH GILLIS v. WESTERN UNION TELEGRAPH COMPANY.

Supreme Court of Vermont, January, 1889.

(61 Vt. 461.)

DUTY OF TELEGRAPH COMPANY TO ITS PATRONS.— LIMITING LIABILITY.—
UNREPEATED MESSAGE.

The legal status of a telegraph company is practically the same as that of a public carrier of passengers for hire. Both are engaged in business of a public nature; both must serve all who come; neither is an insurer nor liable as such, but both are liable for negligence.

The ordinary stipulation in telegraph blanks, limiting the liability of the company as to all unrepeated messages, held, contrary to public policy and void so far as respects immunity from its own and its servants' negligence.

Cases of this series cited in opinion: *Kiley v. W. U. Tel. Co.*, ante, p. 650; *Grinnell v. W. U. Tel. Co.*, vol. 1, p. 70; *Tyler v. W. U. Tel. Co.*, vol. 1, p. 14; *Pinckney v. W. U. Tel. Co.*, vol. 1, p. 516; *W. U. Tel. Co. v. Buchanan*, vol. 1, p. 1, *Smith v. W. U. Tel. Co.*, vol. 1, p. 743; *Ayer v. W. U. Tel. Co.*, ante, p. 601; *Fowler v. W. U. Tel. Co.*, ante, p. 607; *Tel. Co. v. Griswold*, vol. 1, p. 329; *Thompson v. W. U. Tel. Co.*, vol. 1, p. 772; *W. U. Tel. Co. v. Blanchard*, vol. 1, p. 404; *Marr v. W. U. Tel. Co.*, ante, p. 720; *Womack v. W. U. Tel. Co.*, vol. 1, p. 454.

ACTION on the case for damages caused by error in the transmission of a telegram.

Windham county, trial at September term, 1888—VEAZEY, J., presiding. Judgment for plaintiff; exceptions by defendant.

Waterman, Martin & Hitt, for the plaintiff.

Haskins & Stoddard, for the defendant.

The opinion of the court was delivered by ROWELL, J.: The plaintiff, a peddler, telegraphed from Rochester, N. H., to the American Express Company's agent at

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Brattleboro, Vt., to "send my bale here." Through the want of due care in transmission, the letter "H" got changed to "Y," so that when received at Brattleboro the message purported to come from Rochester, N. Y., and the bale was sent there, to the damage of the plaintiff. The message was unrepeated, and written on one of the company's blanks, containing the usual condition as to unrepeated messages, namely, that the company should not be liable for mistakes in the transmission thereof, "whether happening by the negligence of its servants or otherwise, beyond the amount received for sending the same." The plaintiff did not read this condition, nor know what it was, although he had sent and received a good many communications by telegraph.

Treating the condition as binding on the plaintiff if valid, although not brought home to his knowledge, as it was treated in argument, the question is whether it is valid or not.

It is very generally conceded that telegraph companies may limit their common-law liability by express contract, and also by rules and regulations, when brought to the knowledge of their patrons and assented to by them. But as to the extent to which they may do this, and as to the reasonableness of the rules and stipulations by which they seek to do it, courts do not agree.

It seems to be a fundamental principle, running through all the cases, that rules and stipulations for immunity, in order to be valid, must be just and reasonable in the eye of the law, and not inconsistent with sound public policy. But the cases differ widely in the application of this principle, and largely, no doubt, because of the conflicting views as to the legal status of such companies.

A few of the earlier cases hold that they are common carriers, or, if not strictly such, yet sufficiently so to make them amenable to the same law as common carriers. *Parks v. Alta Cal. Tel. Co.*, 13 Cal. 422 (S. C., Am. Dec. 589) is a leading case of this character. But this view has not obtained, and it is now generally held in this country that telegraph

companies are not common carriers, nor liable as such, but are liable only for failure to exercise due care; and the ground of this proposition is that although telegraph companies, like common carriers, are in the exercise of a public calling, and consequently under obligation to serve all who choose to employ them within the scope of their business, yet that the difference between the transmission of intelligence by means of electricity and the transportation of goods by any means is so great that telegraph companies are not common carriers, and that the principle of public policy that imposes upon common carriers the exceptional liability of insurers is not applicable to them. *Kiley v. W. U. Tel. Co.*, 109 N. Y. 231; *Grinnell v. W. U. Tel. Co.*, 113 Mass. 299; *Tyler v. W. U. Tel. Co.*, 60 Ill. 421; *Birney v. Printing Tel. Co.*, 18 Md. 341 (S. C. 81 Am. Dec. 607), and cases *passim*.

A few cases assign telegraph companies to the category of bailees for hire, as *Birney v. Printing Tel. Co.*, *supra*; *Pinckney v. W. U. Tel. Co.*, 19 S. C. 71, and some others; and the argument is that, as the ground of their liability is the same as that of bailees, the legal status of the two must be the same. But this doctrine is justly criticised, because telegraph companies are engaged in a business of a public nature, and are precluded by rights and duties incident thereto from occupying the legal status of an ordinary bailee for hire, whose rights and duties arise wholly from the contract of employment. Gray's Com. by Tel., s. 10.

Although there may be no analogy between the business of telegraph companies and that of public carriers of passengers for hire, yet we regard their legal status as practically the same. Both are engaged in a business of a public nature. Both must serve all who come. Neither are insurers, nor liable as such; but both are liable for negligence.

The question, then, is whether it is just and reasonable in the eye of the law, and consistent with public policy, that telegraph companies should be allowed to stipulate for

immunity from liability for their own and their servants' negligence.

The Supreme Court of the United States holds that common carriers can not lawfully stipulate for exemption from liability when such exemption is not just and reasonable in the eye of the law; that it is not just and reasonable in the eye of the law for them to stipulate for exemption from liability for the negligence of themselves or their servants; and that these rules apply to carriers of goods and to carriers of passengers for hire, and with special force to the latter. *Railroad Co. v. Lockwood*, 17 Wall. 357. If, then, as we have said, the legal status of telegraph companies and of carriers of passengers for hire is practically the same, the case is strong authority against the validity of the stipulation under consideration. "Conceding," the court says, "that special contracts made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable, to the extent, for example, of excusing them for all losses happening by accident, without negligence or fraud on their part, when they ask to go still further, and to be excused for negligence, an excuse so repugnant to the law of their foundation and to the public good, they have no longer any plea of justice or reason to support such a stipulation, but the contrary." This case agrees with the general rule on the subject.

While courts differ widely as to whether telegraph companies can lawfully stipulate to any extent against liability for negligence, none appear to have gone the length of holding that they can properly stipulate against liability for *gross negligence*, as they call it. But many of the cases hold that regulations like the one in question, as to non-liability in respect of unrepeated messages and similar regulations, are reasonable precautions for telegraph companies to take, and are binding upon all who assent to them, so as to exempt the company from liability beyond the amount stipulated for any cause except gross negligence or wilful misconduct on its part. Such a regulation, it is

said, does not undertake wholly to exempt the company from liability for loss, but merely requires the other party to the contract, if he considers the transmission and delivery of the message of such importance to him that he intends to hold the company responsible in damages beyond the amount paid for the message for non-fulfilment of the contract on its part, to increase the payment by one-half ; and that even common carriers have a right to inquire as to the quality and value of the goods and packages intrusted to them for carriage, and are not liable for goods of unusual value, if false answers are made to their inquiries. The cases of this class have been so often and so fully reviewed, and the ground of them stated, that it is not necessary to review them here, nor to do more than refer to some of them. *Grinnell v. W. U. Tel. Co.*, 113 Mass. 299, is a leading case of this class, in which Mr. Chief Justice GRAY reviews the cases to a considerable extent, and points out what is regarded as the fallacy of some of them. The following cases are also of this class : *Kiley v. W. U. Tel. Co.*, 109 N. Y. 231 ; *Wann v. W. U. Tel. Co.*, 37 Mo. 472 (S. C. 90 Am. Dec. 395) ; *W. U. Tel. Co. v. Carew*, 15 Mich. 525. ; *Passmore v. W. U. Tel. Co.*, 78 Pa. St. 238 ; *W. U. Tel. Co. v. Buchanan*, 35 Ind. 429 ; *Lassiter v. Tel. Co.*, 89 N. C. 334.

In these cases gross negligence seems to be used to define a degree of carelessness greater than that involved in ordinary negligence, and one of which the law takes distinct cognizance as an independent ground of liability. It may well be doubted whether there is any difference in law between *negligence* and *gross negligence*. The tendency of judicial opinion is to deny it. But however that may be, we are not prepared to follow this line of cases. As this is the first time this question has ever been before this court for decision, we are at liberty to adopt the view we regard as most just and reasonable, and the most consistent with sound public policy ; and when we consider the relation of telegraph companies to the public, the character and extent of their business, and the duties and obligations inci-

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dent thereto, we see no sufficient reason for distinguishing between ordinary and gross negligence in this behalf, and think it most just and reasonable, and most consistent with sound public policy, that they be not allowed to stipulate against liability for negligence of any kind, if there be more than one kind.

Telegraph companies do not deal with their employers on equal terms. There is a necessity for their employment. They are created to promote public convenience ; and until the introduction of the telephone they were, and practically still are, especially for considerable distances, without competition, save among themselves, in the transmission of intelligence by electricity. Their business has increased to vast proportions, and neither the commercial world nor the general public can dispense with their services. It is therefore just and reasonable that they should not be allowed to take advantage of their situation, and of the necessities of the public, to exact exemption from that measure of duty that the law imposes upon them and that public policy demands.

A former eminent chief judge of this court, in his collection of American Railway Cases, says that "every attempt of carriers, by general notice or special contract, to excuse themselves from responsibility from losses or damages resulting in any degree from their own want of care or faithfulness, is against the good faith which the law requires as the basis of all contracts and employments, and therefore based upon principles and a policy that the law would not uphold." This doctrine is equally applicable to telegraph companies.

In the recent case of *Smith v. W. U. Tel. Co.*, 83 Ky. 104 (S. C. 4 Am. St. Rep. 126), it is said that telegraph companies are public agents, engaged in a *quasi* public business ; that care and fidelity are essential to their character as public servants, and that public policy forbids that they should abdicate as to the public by a contract with an individual, who is but one of millions whose business will not, perhaps, admit either of delay or contest in the courts,

but who is compelled to submit to any terms that the company may impose, and that the law should not uphold a contract by which public agents seek to shelter themselves from the consequences of their own wrong and neglect; that the liability of telegraph companies is not founded wholly upon contract; that they are chartered for public purposes, extraordinary powers conferred upon them, the right of eminent domain given to them, and that if they did not serve the public they could not constitutionally string wire over a man's land without his consent; wherefore they are obliged to receive and transmit messages, and are liable for neglect without any express contract, and that, if they rely upon a contract or a notice to restrict liability, it must be one not in violation of public policy; that, in view of the vast interests committed to them, the extraordinary powers conferred upon them, and the virtual monopoly they enjoy, courts should compel them, *nolens volens*, to perform the corresponding duties of diligence and good faith to the public thereby created; that any other rule would defeat the very purpose for which the companies are chartered, namely, the accurate and speedy transmission of messages for the public; that while they may restrict their liability to a reasonable extent, they can not to the extent of immunity from the consequences of their own negligence; that they must bring to the discharge of their duties that degree of care and skill that careful and prudent men exercise in like circumstances; and that any stipulation by which they undertake to relieve themselves from this duty, or to restrict their liability for its non-performance, is forbidden by the demands of sound public policy; and that to hold otherwise would arm them with very dangerous power, and leave the public comparatively remediless. This reasoning is entirely satisfactory to us, and we adopt it as our own.

There are many other cases that hold the same way, and upon substantially the same grounds, among which are the following: *True v. Int. Tel. Co.*, 60 Me. 1; *Ayer v. W. U.*

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Tel. Co., 79 Me. 493 (S. C. 1 Am. Stat. Rep. 353); *Fowler v. W. U. Tel. Co.*, 15 At. Rep. 29 (Me.); *Tel. Co. v. Griswold*, 37 Ohio St. 301; *Tyler v. W. U. Tel. Co.*, 60 Ill. 421 (S. C. 74 Ill. 168); *Thompson v. W. U. Tel. Co.*, 64 Wis. 531; *Sweatland v. Ill. & Miss. Tel. Co.*, 27 Iowa, 433; *W. U. Tel. Co. v. Blanchard*, 68 Ga. 299; *Marr v. W. U. Tel. Co.*, 85 Tenn. 529; *Womack v. W. U. Tel. Co.*, 58 Texas, 176. *Judgment affirmed.*

NOTE—See INDEX to this and to previous volume, titles “Duty to Customers,” “Limiting Liability.”

See notes, vol. 1, pp. 79, 99; vol. 2, pp. 616, 654.

S. F. CUTTS V. WESTERN UNION TELEGRAPH COMPANY.

Wisconsin Supreme Court, Feb. 28, 1888.

(71 Wis. 46.)

TELEGRAPH COMPANY.—WISCONSIN STATUTE.—DAMAGES.

Chapter 171, Wisconsin laws of 1885, renders telegraph companies liable for the damages resulting directly from their negligence in the transmission of messages, of the contents of which the agent receiving the message for transmission is acquainted.

In absence of evidence that items of damages claimed were caused by the negligence of the company, only the price of transmission can be recovered in an action for negligent delay.

Case of this series cited in opinion: *Thompson v. W. U. Tel. Co.*, ante, p. 634.

APPEAL from Circuit Court of Winnebago county.

Action for damages. The facts as stated by the court were as follows:

The plaintiff resides at Oshkosh. The night of Friday, April 23, 1886, at about midnight, plaintiff received from the defendant company a telegram from Harley, Wisconsin,

announcing the death of his son at that place, in these words: "Will died at 6 P. M. What shall we do?"

The plaintiff immediately answered: "Will come on first train," and delivered the answer to the agent of the defendant for transmission to Hurley, paying therefor 40 cents. Plaintiff thereupon procured a casket, and, taking with him an undertaker, left Oshkosh on the first train for Hurley, arriving there at 6 P. M. on Saturday evening. He found that a coffin had been procured, and the remains of his son placed in it before his arrival, and that the remains were in a bad condition. He paid the person who furnished the coffin five dollars to take it back. He also had the remains embalmed, which cost him \$20 more than it would had they been in good condition. The telegram which he had sent did not reach Hurley until about 11 o'clock A. M. on Sunday—just as he was about leaving with the remains for Oshkosh. The plaintiff's son was an adult, and had been engaged in business at Hurley on his own account. This action was brought to recover damages for the failure to transmit the message from Oshkosh on Friday night. A trial of the action resulted in a verdict for the plaintiff for \$25.40 (being the above items). Motion for a new trial was denied, and judgment entered pursuant to the verdict. The defendant appeals from such judgment.

Finch & Barber, for appellant.

John W. Hume, George Hilton and Gabe Bouck, for respondent.

LYON, J.: Chap. 171, Laws of 1885, is as follows:

"Any person, association, or corporation operating or owning any telegraph lines doing business in this State, shall be liable for all damages occasioned by failure or negligence of their operators, servants, or employés in receiving, copying, transmitting, or delivering dispatches or messages."

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Although this statute was referred to by M.r Justice TAYLOR in *Thompson v. W. U. Tel. Co.*, 64 Wis. 537, yet this is the first case subject to that statute which has reached this court. The case just cited arose before the statute was enacted. It is claimed by counsel for the plaintiff that the above law renders each telegraph company doing business in this State liable for any and all damages sustained through its negligence in respect to the transmission of messages delivered to it for that purpose, and flowing directly and proximately therefrom, even though the import of the telegram is wholly unknown to the company's agent, as in the case of cipher dispatches not translated to the agent. We shall not attempt an interpretation of this statute any further than to hold that it does render telegraph companies liable for the damages resulting directly from their negligence in the matter of transmitting messages; especially where, as in this case, the agent of the telegraph company is acquainted with the contents and significance of the message. It is unnecessary that we should go further in this case.

There is no testimony in the present case showing, or tending to show, when the coffin was procured, and the body of the plaintiff's son placed in it, or the cause of the bad condition of the body, or that the circumstances would have been any different had the message been forwarded to Hurley, and received there in proper time. In the absence of proof of those facts, it does not appear that the items of expense to which the plaintiff was subjected on account of the coffin, and for embalming the body, had any connection whatever with the failure of the defendant to transmit the message in time. Such proof is absolutely essential to a recovery by plaintiff for those expenses. Because of such failure of proof, it was error of the court to submit to the jury the question of the liability of the defendant for those expenses. Under the evidence, the most the plaintiff could recover was the sum he paid the defendant for transmitting, which was 40 cents. For these

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reasons the judgment of the County Court must be reversed, and the cause will be remanded for a new trial.

By the COURT: It is so ordered.

NOTE.—The following Wisconsin cases upon the liability of telegraph companies are in vol. 1 of this series: *Hibbard v. W. U. Tel. Co.*, p. 62; *Candee v. W. U. Tel. Co.*, p. 99; *Heimann v. W. U. Tel. Co.*, p. 531; *Thompson v. W. U. Tel. Co.*, p. 772.

HEWLETT V. WESTERN UNION TELEGRAPH CO.

U. S. Circuit Court, W. D. Tennessee, July 1, 1886.

(28 Fed. R. 181.)

REASONABLE REGULATION.

A regulation of a telegraph company, printed in its blanks, requiring the deposit by transient persons tendering for transmission telegrams requiring answers, of a sum sufficient to pay for transmitting the answer, held reasonable and valid.

Case of this series cited in opinion: *W. U. Tel. Co. v. McGuire*, vol. 1, p. 777.

ACTION for damages. Facts stated in opinion.

Thos. H. Jackson, for plaintiff.

J. W. Bonner and *L. W. Humes*, for defendant.

HAMMOND, J.: The plaintiff, being transiently in the city of Memphis, sent from his hotel to the defendant company's office, with sufficient money to pay for it, the following message, to be transmitted by telegraph:

“1 P. M., GASTON'S, Memphis, December 16, 1881.

“To R. O. Bean, Leighton, Ala.: Will leave to-night. Will you wait for me?
T. G. HEWLETT.”

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The errand boy was told by the company's clerk that it would not be received without an additional sum to pay for the answer, and, not having that, he returned to the hotel, and the message was never sent, the plaintiff not having been informed of defendant's refusal to take it until it was too late to take the train. He sues for damages, and proves that he and one Bean were engaged in a joint enterprise to capture a fugitive from justice, for whose arrest there was a reward to be had of \$1,600, which Bean received, and refused to share with plaintiff because he did not come to help. His failure to go he attributed to his failure to receive an answer to his message, and he claims compensation, to the extent of his share of the reward, from the defendant, for its refusal to transmit it.

The company justifies under its regulations on that subject, which it insists are reasonable. They are as follows:

"(11) All messages, except answers, or covered by franks, must be prepaid unless guaranteed by responsible parties. *Messages on the business of the party sending, and answers to collect messages, must invariably be prepaid.* Messages addressed to hotels, or to parties absent from home, must be prepaid in all cases, *unless they are answers to messages marked 'answer prepaid.'*"

"(12) Transient persons sending messages which require answers must deposit in advance an amount sufficient to pay for a reply of 10 words. In such cases the signal '33' will be sent with the message, signifying that the answer is prepaid."

The only case cited by counsel, and they say that it is the only one directly in point as to the reasonableness of these rules in their relation to the deposit of money to pay for the expected answer by transient persons, is that of *W. U. Tel. Co. v. McGuire*, 104 Ind. 130 (S. C., 2 N. E. Rep. 201), where it was held to be reasonable, and I am of the same opinion. I am not entirely satisfied with the grounds of that judgment; for it seems to me to place the ruling too entirely upon a mere question of etiquette between the parties to the correspondence. The court says:

"A person who sends another a message, and asks an

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answer, promises, by fair and just implication, to pay for transmitting the answer. It is fairly inferable that the sender who asks an answer to his message will not impose upon the person from whom he requests the answer the burden of paying the expense of its transmission. The telegraph company has a right to proceed upon this natural inference, and to take reasonable measures for securing legal compensation for its services."

This may be true, if we assume that the subject-matter of the message concerns the business of the sender, and that only, and not at all the business of the addressee. Then it would be the rule of social etiquette, of course, as it is if one writes a letter strictly on his own business to inclose a postage stamp for the reply. But there is great force in the argument of plaintiff's counsel that it is none of the telegraph company's business to enforce rules of social courtesy like that; and since it can not know whether there will be any reply, or whether, if there be, the circumstances may not be such that the sender of the answer should himself pay for it, and be anxious and willing to do so, the company should not refuse to send the original message, if it be paid for. He likened it to a regulation of a carrier of passengers refusing to transport a passenger at regular rates, unless he would buy a return ticket. And I take it that in an equal number of cases the relation of the parties may be such that the sender might reasonably expect and demand, notwithstanding the social rule of courtesy above referred to, that his correspondent should pay for the answer, and that in an equal number of cases he does do so. In many other cases, when the original message is solely about his own business, the sender may reasonably hope and expect the answer to be paid for by the other party. Again, often a transient person in distress, and with reduced funds, might wish to rely on the other party to pay for the answer; and since the company may protect itself by refusing to take the answer without prepayment by its sender, it would seem an unreasonable hardship, under those circumstances, to demand that he

pay for both messages in advance. Or he might wish to go away to receive the answer, or to receive it over another line, or at another place, etc., and so, under many imaginable circumstances, be reasonably exempt from the burden of depositing money in advance for a message he may never receive, and find it inconvenient and expensive to get back his deposit. Hence, take it altogether, I should not support the reasonableness of this regulation wholly on the ground of the sender's obligation to pay for the answer. He may very often be not so obliged, and that is an answer to it.

But I think this regulation is a reasonable one, notwithstanding the force of the plaintiff's attack on this Indiana case. It should not be segregated from the other regulations of the company on the subject of collecting the tolls, and tested by itself alone, on the reasoning of the plaintiff's argument, as above set forth. This is only one regulation of a carefully devised system for securing payment of tolls, consistently with enlarged accommodation of the public in allowing the customers of defendant to regulate among themselves this very matter of adjusting the burden of these tolls. I have quoted in the statement of facts the entire regulations on the subject, as I find them printed, italics and all, and an analysis of them shows that the company is endeavoring to accommodate the public as much as possible in this matter. It might reasonably, as the railroads do as to passenger fares, demand prepayment by the sender of all messages, whether they be originals or answers. But it does not do this. It allows answers to be sent at the expense of the person whose message is answered, and this is a privilege and a benefit it seeks to confer on the original sender by undertaking to collect of him that toll instead of requiring his correspondent to pay it, thereby lessening the chances of his answering at all. It requires all original messages to be prepaid or guaranteed. If guaranteed, the company will allow the sender, if he choose, to place the burden of the toll on the addressee, by itself undertaking to collect the toll of him in the first instance,

but of the sender at last, if the other refuses to pay. It seeks, as to answers, to accommodate the public in the same way, by undertaking to collect of the person addressed; and, as I understand the regulations, the sender of the answer is not expected to pay at all, certainly not to prepay, unless it be an answer to a message which has been sent to be collected from himself, or is sent to parties away from home, or addressed to hotels; and in these last-mentioned cases he need not prepay if it be an answer to a message marked "answer prepaid." In order to give them, their correspondents, and all persons who are interested in the use of the telegraph, the benefit of this system of collecting and adjusting tolls, the requirement is made that transient persons shall pay for the expected answers in advance, and it is not unreasonable, as a part of that system. It may be that a more liberal rule might be devised for transient persons, and that this one operates sometimes harshly and inconveniently; but that is not the question. In view of the whole system, a court cannot say that the power and discretion of the company to determine for itself what is best for all concerned has been unreasonably exercised. It has a choice of its own regulations, and the test of reasonableness is not whether some other would answer its purposes as well or better, but whether this is fairly and generally beneficial to the company, and all its customers.

Now, I have said elsewhere that reasonable regulations of public corporations like these must be reasonably applied, and that a rule which is generally fair may, under especial circumstances, become oppressive and unreasonable, as applied in the particular case; and so these corporations must exercise ordinarily prudent discretion in relaxing their regulations in such cases. If, to use an illustration of the argument, a tramp, with just money enough to pay for his message, should so inform the company, and ask to have it transmitted, and take pay for the answer from its own sender, and this should be refused, it may be that the company would be liable; but I should think that, under these regulations, there would be in such

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case no refusal, and that almost any intelligent operator, when so informed, would take the message. No such case is shown here. The plaintiff was neglectful in not looking after his message sooner than he did, and he was not a tramp, or destitute of funds to deposit for the answer.

I do not say that if the company were otherwise liable, this would have been contributory negligence on his part, for that point is not now for decision, but only that the plaintiff does not prove any circumstances to take his case out of the general reasonableness of the rule in its application to him. This view renders it altogether unnecessary to consider the question, so thoroughly argued on both sides, as to the measure of damages in cases like this. But I may be permitted to say that possibly the cases so abundantly cited concerning a neglect to send accepted messages, or the sending of them defectively, may not apply to a case where the company wrongfully refuses to take the message at all, because of an unreasonable regulation. It is ingenious to say that a plaintiff in such a case is no worse off than one whose message is taken and not sent, but it may not be sound; because all corporations in the public service may be compelled by actions of this kind, and by substantial damages, to keep reasonable regulations, and to reasonably administer them in all cases; and a failure in that regard may not be alike in cause of action, or in the matter of damages, as a neglect to send an accepted message. It may be useful to this company to call attention to this possible distinction in the measure of damages.

Judgment for defendant.

NOTE.—See INDEX to this and previous volumes, title “Rules and Regulations.”

See note to *W. U. Tel. Co. v. Hall*, *post*.

D. BODKIN, JR., v. WESTERN UNION TELEGRAPH CO.*U. S. Circuit Court, D. Kentucky, February 14, 1887.*

(31 Fed. R. 134.)

FAILURE TO DELIVER TELEGRAM.—DAMAGES.—PROXIMATE CAUSE.

A message presented to a telegraph company for transmission contained instructions as to the proper time to take a barge to a certain place for a load of staves, it being necessary to take advantage of the rising and falling of water in a creek. The company delayed delivery of the telegram until the water had risen too high for the barge to pass a bridge, in consequence of which the plaintiff was unable to reach the staves for several weeks, and he lost certain staves and was put to expense as to others.

In an action to recover for the damages sustained, held that a demurrer to the petition must be overruled, since there being a breach by the telegraph company, nominal damages would be awarded, but that the negligence of the company was not the proximate cause of the actual damage sustained.

ACTION for damages. Trial of demurrer. The facts are stated in the opinion.

White & Reeves and *J. M. Bigger*, for plaintiff.

Henry Barnett, for defendant.

BARR, J.: Plaintiff alleges that he made a contract with F. Norman, who did business in Mound City, Illinois, in which it was agreed he (Norman) would pay plaintiff \$50 per thousand for all the staves he would get out and deliver to him at Mound City, Illinois. In this agreement Norman was to furnish vessels suitable for the purpose of shipping the staves from where they were made to Mound City; that he made, under the agreement, about 40,000 staves, and had them on or near the banks of Mayfield creek, which

empties into the Mississippi river at or about ten or twelve miles below Mound City. Mayfield is a small creek which only furnishes water enough to float barges and other like vessels when it is high, and hence it must be used for that purpose when the water is high. He alleges that when he was ready with his staves on said creek, he notified Norman, and it was agreed between them that the staves would be shipped whenever the water was at a suitable stage, and that Norman was to send a barge to the mouth of Mayfield creek and notify plaintiff, and plaintiff was to take it from there up the creek to the staves, and there load the barge, and deliver the staves to him at Mound City. He says that when the water began to rise, and was rising rapidly, Norman sent a barge to the mouth of Mayfield creek and secured it at or near the bridge of the Mobile Railroad Company, which is just above the mouth of the Mayfield creek, and that said Norman wrote and delivered to the defendant's agent at Mound City a telegram addressed to plaintiff, at Bardwell, which was as follows :

" MOUND CITY, Ills.

" D. Bodkin, Jr., Bardwell : Barge at Mobile bridge. Get them above as soon as possible. F. NORMAN."

He alleges that defendant undertook to deliver this telegram within a reasonable time ; that in fact it was promptly transmitted to Bardwell, but defendant failed to deliver it for thirty hours after its receipt at Bardwell, although plaintiff lived within a hundred yards of defendant's office, and was actually in defendant's office within that time ; that this failure was because of negligence and carelessness of defendant's agent ; that plaintiff went, immediately upon the receipt of said telegram, to said barge and found it in good order, and he without delay started up the creek with it, and did pass up under Mobile bridge, and ascended up the creek until he got to the bridge of the Illinois Central Railroad Company, which is a short distance above the Mobile bridge. When he got there he found the water had risen so high that he was unable to get said barge

above said bridge. He says that the water continued to rise, and did overflow the banks of said creek, and remained up four or five weeks, during all of which time he was unable to get said barge up to the staves. He says that about 20,000 of his said staves were carried off by high water, and were entirely lost, and that a large number of them were floated out into the bottom and were recovered by him at great expense and labor. He says that if said telegram had been delivered to him within a reasonable time after it was received by the defendant at Bardwell, he could and would have passed the said barge under the said railroad bridge, and have gone to the staves, and loaded them upon said barge, long before the water got to such a height as to float them off, and he would have saved them all, and would have avoided the loss of them as aforesaid, and the delay, labor and expense of recovering the others. He alleges that he was damaged in the sum of \$2,000 because of the failure of defendant to deliver said telegram within a reasonable time.

The defendant has demurred to this petition, and insists that, upon the facts alleged, plaintiff is not entitled to recover any amount of damages.

Assuming that plaintiff has a right of action for a breach of this contract, if there be a breach, and damage, and this seems to be conceded by defendant's counsel, the question arises, has there been a breach, and was plaintiff damaged? Certainly, a delay of thirty hours in the delivery of a dispatch to a person who was within a few hundred yards of the telegraph office was a breach of the contract. It is, however, insisted that the dispatch means, "Get the barge above Mobile bridge as soon as possible," and as the plaintiff did get it above this bridge, notwithstanding the delay, there was no damage caused by this delay. If this were true, then the damage would be nominal; therefore this demurrer should be overruled because of the nominal recovery.

But, as the question of damages has been discussed by counsel, I shall indicate my opinion now. The dispatch is,

“Barge at Mobile bridge. Get them above as soon as possible.” “Them” may, under the allegation of the petition, refer to the staves. If, however, it refers to the barge, “above,” in this dispatch, does not necessarily or naturally refer to that bridge alone, but rather above in the creek. This is clearly the meaning, taking the statement of the petition as true, and reading the dispatch by the light of those facts.

The main question is as to the measure of damages if the dispatch means, “Get the barge up to the staves as soon as possible.” The general rule is that, for the breach of such a contract, the party may recover the actual damage sustained, but then the damage must be both natural and proximate.

In *Leonard v. New York Tel. Co.*, 41 N. Y. 544, EARL, C. J., states the rule thus :

“The damages must be such as the parties may fairly be supposed to have contemplated when they made the contract. Parties entering into contracts usually contemplate that they will be performed, and not that they will be violated. They may rarely actually contemplate any damages which would flow from any breach, and may frequently have not sufficient information to know what such damages would be. * * * A party is liable for all direct damages which both parties to the contract would have contemplated as flowing from its breach, if, at the time they entered into it, they bestowed proper attention upon the subject, and had been fully informed of the facts.”

ALDERSON, B., in *Hadley v. Baxendale*, 9 Exch. 353, states the rule thus :

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may *fairly and reasonably* be considered either *arising naturally, i. e.*, according to the usual course of things, from such breach of contract itself, or such as may *reasonably be supposed* to have been in the *contemplation*

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of *both parties* at the time they made the contract, as *the probable* result of the breach of it.”

In the case at bar plaintiff is seeking to recover, not the value of the ordinary use of the barge for the time which he was delayed, but the loss of the staves, which he *might have saved from the high water had he been in condition to use it*. This would be a special, and, I think, a remote, damage, in the sense of not being the *usual* and a *direct* damage arising from the non-use of the barge. Here the barge is not lost by reason of the non-delivery of the dispatch, but a lot of staves are lost, which were intended to be loaded upon it, and then the *high water is the direct cause of the loss*. Those staves *might* have been saved had the barge gotten there in time; but to make the defendant liable for a loss of property which was really lost by the high water, because it *might* have been saved by the use of this barge, seems to me to be going beyond the just rule as to damages in such cases.

The breach is the non-delivery of this dispatch, and the damage should be only the loss of the use of the barge in its ordinary and usual uses; not the loss of other property which was not on the barge, and might never have been on it, even if the barge had been there. *Scheffer v. Railroad Co.*, 105 U. S. 249, is a strong case showing how very direct must be the cause of the injury for which damages will be given. There a passenger was so seriously injured by a railroad accident that he became insane, and within eight months committed suicide. They held that the railroad company was not liable in damages for his death, because his own act was the proximate cause.

Demurrer overruled for the reasons given.

NOTE.—See note to *W. U. Tel. Co. v. Hall*, *post*.

JOHN T. JOHNSON v. WESTERN UNION TELEGRAPH
COMPANY.

U. S. Circuit Court, S. D. Georgia, W. D., Dec., 1887.

(83 Fed. R. 862.)

LIMITING TIME TO PRESENT CLAIM.

A stipulation in a telegraph blank freeing the company from liability on account of error, delay, &c., unless the claim were presented within thirty days after sending the message, held unreasonable and void.

Cases of this series cited in opinion: *Redpath v. W. U. Tel. Co.*, vol. 1, p. 40; *Grinnell v. W. U. Tel. Co.*, vol. 1, p. 70; *Passmore v. W. U. Tel. Co.*, vol. 1, p. 168; *Harris v. W. U. Tel. Co.*, vol. 1, p. 37; *Manville v. W. U. Tel. Co.*, vol. 1, p. 92; *W. U. Tel. Co. v. Buchanan*, vol. 1, p. 1; *Aikin v. W. U. Tel. Co.*, vol. 1, p. 121; *Schwartz v. A. & P. Tel. Co.*, vol. 1, p. 284; *Becker v. W. U. Tel. Co.*, vol. 1, p. 337; *W. U. Tel. Co. v. Neill*, vol. 1, p. 352; *Heimann v. W. U. Tel. Co.*, vol. 1, p. 531; *W. U. Tel. Co. v. Jones*, vol. 1, p. 561; *W. U. Tel. Co. v. Meredith*, vol. 1, p. 643; *Cole v. W. U. Tel. Co.*, vol. 1, p. 707; *Blanchard v. W. U. Tel. Co.*, vol. 1, p. 176; *W. U. Tel. Co. v. Shotter*, vol. 1, p. 557; *W. U. Tel. Co. v. Fatman*, vol. 1, p. 666; *Bartlett v. W. U. Tel. Co.*, vol. 1, p. 45; *W. U. Tel. Co. v. Reynolds*, vol. 1, p. 487.

ACTION for damages for failure to deliver a telegram.
Removed from City Court, Macon, Ga.

Decision of motion to direct verdict for defendant. The facts appear in the opinion.

Steed & Wimberly and *Shotrecker*, for plaintiff.

Rigby & Dorsey, for defendant.

SPEER, J.: This is an action brought to recover damages claimed for the non-delivery of a half-rate telegraphic message. The suit is brought by the receiver of the telegram. The printed blank upon which the message was

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written by the sender contains the following printed stipulation:

“This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message. Errors can be guarded against only by repeating a message back to the sending station for comparison; and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeatd night messages sent at reduced rates, beyond a sum equal to ten times the amount paid for transmission; nor in any case where the claim is not presented in writing within thirty days after sending the message. This is an unrepeatd night message, and is delivered by request of the sender, under the conditions named above.

“THOS. T. ECKERT, *General Manager*. NORVIN GREEN, *President*.”

The defendant company insists that it is entitled to a verdict by direction of the court, because no claim was presented to the company within the time specified by the printed stipulation quoted. The elaborate and able argument of the learned counsel for the defendant renders it necessary to consider carefully the precedents cited as controlling the rights of the litigants before the court. To support the proposition that a telegraph company may limit its liability by a stipulation brought to the knowledge of those who transmit messages, the following cases are cited: *MacAndrew v. Telegraph Co.*, Allen Tel. Cas. 38; *Redpath v. Telegraph Co.*, 112 Mass. 71; *Grinnell v. Telegraph Co.*, 113 Mass. 299; *Ellis v. Telegraph Co.*, Allen Tel. Cas. 306; *Young v. Telegraph Co.*, id. 708; *Breese v. Telegraph Co.*, id. 663; *De Rutte v. Telegraph Co.*, id. 273; *Passmore v. Telegraph Co.*, 78 Pa. St. 238; *Harris v. Telegraph Co.*, 9 Phila. 88; *Wolf v. Telegraph Co.*, Allen Tel. Cas. 463; *Telegraph Co. v. Carew*, id. 345; *Camp v. Telegraph Co.*, id. 85; *Manville v. Telegraph Co.*, 37 Iowa, 214; *Birney v. Telegraph Co.*, Allen Tel. Cas. 195; *Sweatland v. Telegraph Co.*, id. 471; *Wann v. Telegraph Co.*, id. 261; *Telegraph Co. v. Gildersleeve*, id. 390; *Graham v. Telegraph Co.*, id. 578; *Telegraph Co. v. Buchanan*, 35 Ind. 429; *Aikin v. Telegraph Co.*, 5 Rich. (N. S.) 358; *Schwartz v. Telegraph Co.*, 18 Hun,

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157; *Becker v. Telegraph Co.* (Neb.), 7 N. W. Rep. 868; *Telegraph Co. v. Neill*, 57 Tex. 283; *Baxter v. Telegraph Co.*, 37 U. C. Q. B. 470.

For the proposition that the use of the blank upon which the regulations and stipulations are printed, will charge the sender with notice, the defendant relies upon *Breese v. Telegraph Co.*, Allen Tel. Cas. 663; *Young v. Telegraph Co.*, id. 708; *Redpath v. Telegraph Co.*, 112 Mass. 71; *Grinnell v. Telegraph Co.*, 113 Mass. 299; *Wolf v. Telegraph Co.*, Allen Tel. Cas. 463; *Becker v. Telegraph Co.* (Neb.), 7 N. W. Rep. 868; *Telegraph Co. v. Carew*, Allen Tel. Cas. 345; *Sweatland v. Telegraph Co.*, id. 471; *Schwartz v. Telegraph Co.*, 18 Hun, 157; *Telegraph Co. v. Neill*, 57 Tex. 283.

To show it is competent and proper for a telegraph company to incorporate in the blank a stipulation requiring claims for losses to be presented to the company within 30 days the defendant's counsel cited and discussed the following cases: Gray Tel. 62; *Heimann v. Telegraph Co.*, 57 Wis. 562 (16 N. W. Rep. 32); note of the same case in Chic. Law J. 269; *Express Co. v. Caldwell*, 21 Wall. 264.

And to show that the rule applies as well to the consignee as to the consignor, the following: *Cole v. Telegraph Co.*, 8 Amer. & Eng. Corp. Cas. 45; *Telegraph Co. v. Jones*, id. 47; *Telegraph Co. v. Meredith*, id. 54; *Telegraph Co. v. Jones*, 48 Amer. Rep. 713 (95 Ind. 228); *Aikin v. Telegraph Co.*, 5 Rich. (N. S.) 358, same case in Digest of Cases, p. 50; *Wolf v. Telegraph Co.*, Allen Tel. Cas. 463; *Young v. Telegraph Co.*, id. 708.

It is not to be denied that these authorities tend to sustain the several propositions of the defendant. On the other hand, it is insisted, that this is a suit in the State Court brought against a foreign corporation doing business in Georgia, and removed under the act of congress into this court, and that the question debated must be determined with close regard to the policy of the law as outlined by statute, and decided by the court of last resort in this State. It is true that the positive local statutes and the decisions

construing them in a State where a Federal court has jurisdiction, forms a rule by which it is governed in civil actions at common law, where such actions do not arise under the laws of the United States. *Livingston v. Moore*, 7 Pet. 469; *Pennington v. Gibson*, 16 How. 69. This rule, however, is not applicable when the suit is between citizens of different States, and the question in dispute is one of general jurisprudence. In such cases the parties are entitled to the independent judgment of the Federal court. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Chicago v. Robbins*, 2 Black, 418; *Railroad Co. v. Bank*, 102 U. S. 14; *Hough v. Railroad Co.*, 100 U. S. 213; *Railroad Co. v. Myrick*, 107 U. S. 109 (1 Sup. Ct. Rep. 425); *Burgess v. Seligman*, 107 U. S. 20 (2 Sup. Ct. Rep. 10); *Insurance Co. v. Broughton*, 109 U. S. 121 (3 Sup. Ct. Rep. 99).

We are remitted then, so far as decided cases will control, in the determination of this question to those decisions upon this much mooted question which are entitled to the highest consideration. The question is, can a telegraph company by special contract limit its common law liability, and can it stipulate for exemption from the consequences of its own or its servants' negligence. In *Hart v. Railroad Co.*, 112 U. S. 338 (5 Sup. Ct. Rep. 151), the Supreme Court of the United States quote with approval the propositions announced in *Railroad Co. v. Lockwood*, 17 Wall. 357, and *Express Co. v. Caldwell*, 21 Wall. 264. The principle deducible from these cases is that while by contract the corporation may in certain cases limit its liability, the claim of the company for exemption from liability must rest upon the reasonableness and fairness of the stipulation to that purport in the contract; and this court, as it is bound to do, cheerfully adopts the wise and equitable conclusion thus announced. The Supreme Court seems to consider telegraph companies as standing upon a similar basis with common carriers, as to this question; and the statute of Georgia (Code, 2068) provides that common carriers cannot limit their legal liability by any notice given either by publication or by entry on receipts given or

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tickets sold, but may by express contract. This statute was not mentioned in the argument; but, whether controlling or not, it indicates the policy of this State, as do several decisions of its court of last resort. *Blanchard v. Telegraph Co.*, 68 Ga. 299; *Telegraph Co. v. Shotter*, 71 Ga. 760; *Same v. Fatman*, 73 Ga. 285. Now, it is held that regulations which contravene the constitutional law or public policy of the place where they are set up are unreasonable. *Bartlett v. Telegraph Co.*, 62 Me. 209-213; *True v. Telegraph Co.*, 60 Me. 9-11; *Telegraph Co. v. Graham*, 1 Col. 230; *Telegraph Co. v. Reynolds*, 77 Va. 173; *Ellis v. Telegraph Co.*, 13 Allen, 226. Is a stipulation which has the effect to preclude from his right of action the person to whom a prepaid telegram is directed, and to whom it has never been delivered, no matter how gross the negligence of the telegraph company may be, a reasonable regulation? In the opinion of this court it is clearly unreasonable, and, besides, contrary to general public policy. He must present his claim in writing, in thirty days from the time the telegram is sent; but the failure of the company to deliver it deprives him, perhaps, of all notice that a telegram has been sent to him. How then can he be expected to make a claim for damages when he may be unconscious of the injury done him? If the stipulation is valid, the telegraph company can very readily defeat all redress by holding the telegram for thirty days after it is sent. Take this case: The plaintiff, assuming *ex gratia exempli* his statements to be true, is a farmer who lives six miles in the country; he has business negotiations important to him, but unimportant perhaps to his correspondents in Omaha; he leaves his address at the telegraph office; he calls repeatedly for his telegram; he is informed there is nothing for him; the telegraph company wires the Omaha firm that there is no such man as the plaintiff; they drop the matter; not receiving his telegram, he drops it; after the expiration of thirty days he discovers the injury done him. Would any court of justice hold that it would be reasonable under such circumstances to deny

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his right of action? And yet if the thirty days' stipulation is valid at all, it would be valid in that case. Such a stipulation would be especially unreasonable where the company, because of its monopoly, has the power to deprive the citizen of the means of telegraphic communication, unless he will subscribe to its regulations, however unreasonable. I can not recognize the doctrine as insisted by defendant's counsel, and the case must be determined upon the facts and other rules of law involved.

NOTE.—See INDEX to this and to previous volume, title "Limiting Time."
See note to next case.

Beasley v. W. U. Tel. Co., Circuit Court, W. D. Texas, San Antonio Division, May 29, 1889, contains only a charge to a jury. Among the points charged were these:

The sender of a message is bound by the stipulations printed in the blank which he uses, whether he read them or not.

He is not bound to know a rule of the company requiring messages to be written on blanks.

A telegraph company is bound to use only ordinary care and diligence, and is not bound to use the most direct line, provided that is not in working order and it uses the nearest available one.

A telegraph company is not excused for failure to send a telegram simply because the name of the receiving office was misspelled.

A stipulation limiting time to present claim for damages is valid.

Mental anguish is a proper element of damages, where the result of the delay was the inability of the plaintiff to reach his wife before she died, the telegram being sent to summon him.

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WESTERN UNION TELEGRAPH COMPANY v. GEORGE F.
HALL.

U. S. Supreme Court, January 30, 1888.

(124 U. S. 444.)

DELAY IN TRANSMISSION OF TELEGRAM.—DAMAGES.

A telegram to a broker containing a discretionary order to purchase petroleum was, by the negligent failure of the telegraph company to transmit and deliver promptly, delayed until the price had risen far above what it was at the time the telegram should have been delivered ; and was then so high that the broker did not purchase.

It did not appear that the sender intended to purchase oil to resell at a profit ; or that if the telegram had been delivered in time he would have resold at the advance, or that he could have resold at a profit on any subsequent day.

Held, that nominal damages only could be recovered.

Cases of this series cited in opinion : *Manville v. W. U. Tel. Co.*, vol. 1, p. 92 ; *Thompson v. W. U. Tel. Co.*, vol. 1, p. 772 ; *Turner v. Hawkeye Tel. Co.*, vol. 1, p. 208.

ACTION for damages for delay in delivery of a telegram, due to negligent omission to transmit the name of the addressee. It was brought in the Circuit Court of Polk county, Iowa ; removed by the defendant, on the ground of citizenship, to the United States Circuit Court, S. D. Iowa ; there tried by the court without a jury, and judgment for \$1,800 awarded plaintiff.

The message was from the plaintiff to his broker. It was written upon the usual blank, and was as follows :

“ 11-9, 1882.

“ To Charles T. Hall, Exchange. Oil City, Pa.:

“ Buy ten thousand if you think it safe. Wire me. GEO. F. HALL.”

The cause was brought to the Supreme Court upon a certificate of division of opinion upon six points, only one of which was considered. to wit :

“4th. Admitting the liability of defendant to respond in damages beyond the sum paid for forwarding the message, what rule is to govern in ascertaining the same? Are the damages merely nominal, or is plaintiff entitled to the difference in value of the oil at the time it would have been purchased for plaintiff had the message been properly forwarded and the value at the time it could have been purchased after the actual delivery of the message to Charles T. Hall, at Oil City, Pa., it being admitted that he did not make the purchase for the reason that, in his judgment, the price on the morning of November 10th, 1882, was too high to justify purchasing?”

Further facts sufficiently appear in the opinion.

Wager Swayne and Rush Taggart, for plaintiff in error.

Charles A. Clark, Crom. Bowen and Whiting S. Clark, for defendant in error.

Opinion of the court by MATTHEWS, J.:

The view we take of this case requires us, in answer to the fourth question certified, to say that, in the circumstances disclosed by the record, the plaintiff was entitled only to recover nominal damages, and not the difference in value of the oil if it had been purchased on the day when the message ought to have been delivered and the market price to which it had risen on the next day. As the judgment was rendered in his favor for the latter sum, it must be reversed on that account, and, upon the facts found by the court, judgment rendered for nominal damages only, which finally disposes of the litigation. It, therefore, becomes unnecessary to consider or decide any of the other questions certified to us.

It is found as a fact that if the dispatch upon its first receipt at Oil City had been promptly delivered to Charles T. Hall, to whom it was addressed, he would by twelve o'clock on that day have purchased ten thousand barrels of oil at the market price of \$1.17 per barrel on the plaintiff's

account. He was unable to do so in consequence of the delay in the delivery of the message. On the next day the price had advanced to \$1.35 per barrel, and no purchase was made because Charles T. Hall, to whom the message was addressed, did not deem it advisable to do so, the order being conditional on his opinion as to the expediency of executing it. If the order had been executed on the day when the message should have been delivered, there is nothing in the record to show whether the oil purchased would have been sold on the plaintiff's account on the next day or not; or that it was to be bought for resale. There was no order to sell it, and whether or not the plaintiff would or would not have sold it is altogether uncertain. If he had not done so, but had continued to hold the oil bought, there is also nothing in the record to show whether, up to the time of the bringing of this action, he would or would not have made a profit or suffered a loss, for it is not disclosed in the record whether during that period the price of oil advanced or receded from the price at the date of the intended purchase. The only theory, then, on which the plaintiff could show actual damage or loss is on the supposition that, if he had bought on the 9th of November, he might and would have sold on the 10th. It is the difference between the prices on those two days which was in fact allowed as the measure of his loss.

It is clear that in point of fact the plaintiff has not suffered any actual loss. No transaction was in fact made, and there being neither a purchase nor a sale, there was no actual difference between the sums paid and the sums received in consequence of it, which could be set down in a profit and loss account. All that can be said to have been lost was the opportunity of buying on November 9th, and of making a profit by selling on the 10th, the sale on that day being purely contingent, without anything in the case to show that it was even probable or intended, much less that it would certainly have taken place.

It has been well settled since the decision in *Masterton v. The Mayor of Brooklyn*, 7 Hill, 61, that a plaintiff may rightfully recover a loss of profits as a part of the damages for breach of a special contract, but in such a case the profits to be recovered must be such as would have accrued and grown out of the contract itself as the direct and immediate result of its fulfilment. In the language of the Supreme Judicial Court of Massachusetts in *Fox v. Harding*, 7 Cush. 516: "These are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into. But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit." (p. 522.) This rule was applied by this court in the case of *The Philadelphia, Wilmington & Baltimore Railroad v. Howard*, 13 How. 307. In *Griffin v. Colver*, 16 N. Y. 489, the rule was stated to be that "the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, they must be such as might naturally be expected to follow its violation; and they must be certain both in their nature and in respect to the cause from which they proceed. The familiar rules on this subject are all subordinate to these. For instance, that the damages must flow directly and naturally from the breach of contract, is a mere mode of expressing the first; and that they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last" (p. 495.)

In *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487, the rule was stated to be that "the damages for which a party may recover for a breach of a contract are such as ordinarily and naturally flow from the non-performance. They must be proximate and certain, or capable of certain

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ascertainment and not remote, speculative or contingent" (p. 492.) In *White v. Miller*, 71 N. Y. 118, 133, it was said: "Gains prevented, as well as losses sustained, may be recovered as damages for a breach of contract, when they can be rendered reasonably certain by evidence, and have naturally resulted from the breach."

In cases of executory contracts for the purchase or sale of personal property ordinarily, the proper measure of damages is the difference between the contract price and the market price of the goods at the time when the contract is broken. This rule may be varied according to the principles established in *Hadley v. Baxendale*, 9 Exch. 341 (S. C., 23 L. J. Ex. 179), where the contract is made in view of special circumstances in contemplation of both parties. That well-known case, it will be remembered, was an action against a carrier to recover damages occasioned by delay in the delivery of an article, by reason of which special injury was alleged. In the application of the rule to similar cases, where there has been delay in delivering by a carrier which amounts to a breach of contract, the plaintiff is not always entitled to recover the full amount of the damage actually sustained; *prima facie* the damages which he is entitled to recover would be the difference in the value of the goods at the place of destination at the time they ought to have been delivered and their value at the time when they are in fact delivered. *Horn v. Midland Railway Co.*, L. R., 8 C. P. 131; *Cutting v. Grand Trunk Railway Co.*, 13 Allen, 381. Any loss above this difference sustained by the plaintiff, not arising directly from the delay, but collaterally by reason of special circumstances, can be recovered only on the ground that these special circumstances, being in view of both parties to the contract, constituted its basis. *Simpson v. London & Northwestern Railway Co.*, 1 Q. B. D. 274. So the loss of a market may be made an element of damages against a carrier for delay in delivery, where it was understood, either expressly or from the circumstances of the case, that the object of delivery was to get the benefit of the market. *Pickford v.*

Grand Junction Railway Co., 12 M. & W. 766. In *Wilson v. Lancashire & Yorkshire Railway Co.*, 9 C. B. N. S. 632, the plaintiff was held entitled to recover for the deterioration in the marketable value of the cloth by reason of delay in the delivery, whereby the season for manufacturing it into caps, for which it was intended, was lost.

The same rule, by analogy, has been applied in actions against telegraph companies for delay in the delivery of messages, whereby there has been a loss of a bargain or a market. Such was the case of *United States Telegraph Co. v. Wenger*, 55 Penn. St. 262. There the message ordered a purchase of stock, which advanced in price between the time the message should have arrived and the time when it was purchased under another order, and the advance was held to be the measure of damages. There was an actual loss, because there was an actual purchase at a higher price than the party would have been compelled to pay if the message had been promptly delivered, and the circumstances were such as to constitute notice to the company of the necessity for prompt delivery. The rule was similarly applied in *Squire v. Western Union Telegraph Co.*, 98 Mass. 232. There the defendant negligently delayed the delivery of a message accepting an offer to sell certain goods at a certain place, for a certain price, whereby the plaintiff lost the bargain, which would have been closed by a prompt delivery of the message. It was held that the plaintiff was entitled to recover, as compensation for his loss, the amount of the difference between the price which he agreed to pay for the merchandise by the message, which if it had been duly delivered would have closed the contract, and the sum which he would have been compelled to pay at the same place in order, by the use of due diligence, to have purchased a like quality and quantity of the same species of merchandise. There the direct consequence and result of the delay in the transmission of the message was the loss of a contract, which, if the message had been duly delivered, would by that act have been

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completed. The loss of the contract was, therefore, the direct result of the defendant's negligence, and the value of that contract consisted in the difference between the contract price and the market price of its subject-matter at the time and place when and where it would have been made. The case of *True v. International Telegraph Co.*, 60 Maine, 9, can not be distinguished in its circumstances from the case in 98 Mass. 232, and was governed in its decision by the same rule. The case of *Manville v. Telegraph Co.*, 37 Iowa, 214, 220, and of *Thompson v. Telegraph Co.*, 64 Wisconsin, 531, were instances of the application of the same rule to similar circumstances, the difference being merely that in these the damage consisted in the loss of a sale instead of a purchase of property, which was prevented by the negligence of the defendant in the delivery of the messages. In these cases the plaintiffs were held to be entitled to recover the losses in the market value of the property occasioned, which occurred during the delay.

Of course, where the negligence of the telegraph company consists, not in delaying the transmission of the message, but in transmitting a message erroneously, so as to mislead the party to whom it is addressed, and on the faith of which he acts in the purchase or sale of property, the actual loss based upon changes in market value is clearly within the rule for estimating damages. Of this class examples are to be found in the cases of *Turner v. Hawk-eye Telegraph Company*, 41 Iowa, 458, and *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 263; but these have no application to the circumstances of the present case. Here the plaintiff did not purchase the oil ordered after the date when the message should have been delivered, and therefore was not required to pay, and did not pay, any advance upon the market price prevailing at the date of the order; neither does it appear that it was the purpose or intention of the sender of the message to purchase the oil in the expectation of profits to be derived from an immediate resale. If the order had been promptly delivered on the day it was sent, and had been executed on

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that day, it is not found that he would have resold the next day at the advance, nor that he could have resold at a profit at any subsequent day. The only damage, therefore, for which he is entitled to recover is the cost of transmitting the delayed message.

The judgment is accordingly reversed, and the cause remanded, with directions to enter a judgment for the plaintiff for that sum merely.

NOTE.—See INDEX to this and to previous volume, title “Damages.”

In addition to this and the three preceding, see [the following cases in vol. 1, decided by Federal courts, upon the subject of the liability of telegraph companies as carriers of messages: *Jones v. W. U. Tel. Co.*, p. 561; *Abraham v. W. U. Tel. Co.*, p. 728; *Behm v. W. U. Tel. Co.*, p. 856, note; *White v. W. U. Tel. Co.*, p. 858, note.

GENERAL NOTE.

Memoranda of cases not selected for reprinting in full, and not previously mentioned in notes.

CONDEMNATION.

Chicago & Atchison Bridge Co. v. Pacific Mutual Tel. Co. Kansas Supreme Court, Jan., 1887. 36 Kan. 113.

A telegraph company cannot institute condemnation proceedings for a right over a bridge between Kansas and Missouri without first filing the acceptance required by the post-roads act of Congress.

Pacific Mutual Tel. Co. v. Chicago & Atchison Bridge Co. Kansas Supreme Court, Jan., 1887. 36 Kan. 113.

If the method of placing wires along a bridge over a navigable stream, as proposed by a telegraph company in its petition in proceedings for condemnation, will interfere with the opening of the draw of the bridge and so obstruct navigation, the owner of the bridge is entitled to an injunction restraining such proceedings, and the telegraph company cannot avoid it by then changing its plans.

CONTRACT BY TELEGRAPH.

Little v. Dougherty. Colorado Supreme Court, Dec., 1887. 11 Col. 103.

Defendant telegraphed, "will you accept [meaning employment] on two years' guaranty at \$1,400?" Plaintiff answered that he accepted and would be on hand to commence January 10th.

Defendant replied, "I will accept you Jan. 10th. Bring all the pointers possible." Held, contract in writing for two years, good under the statute of frauds.

Perry v. Mt. Hope Iron Co. Rhode Island Supreme Court, July 24, 1886. 5 Atl. R. 632.

(Extract from head-note.) A telegram accepting an offer, if sent within the time agreed upon, completes the contract. The time of telegraphing is the time the contract was closed, and, when sent from one State to another, the State from which it was sent determines the place of the contract.

Culver et al. v. Warren. Kansas Supreme Court, April 8, 1887. 13 Pac. R. 577.

EVIDENCE.—CONVERSATION OVER TELEPHONE.

Globe Printing Company v. Fred Stahl. St. Louis, Mo., Court of Appeals, Nov. 23, 1886. 23 Mo. App. 451.

The telephone has come into such common use that the courts may properly take judicial cognizance of the general manner and extent to which it is used by the business community.

A witness testified that he called up the central telephone office, requested to be connected with the defendant's place of business, asked the person who responded if he was the defendant, was answered in the affirmative, and a conversation ensued.

Witness did not know the defendant, nor his voice. Held, that the witness was properly permitted to testify to the conversation.

Wolfe et al. v. Missouri Pacific Railway Co. Missouri Supreme Court, March 4, 1889. 97 Mo. 478.

A question arose incidentally at the trial upon the admission in evidence of a conversation held through the telephone between some one at the instrument in plaintiff's private office and the witness. It was admitted, though the witness did not identify the voice of the speaker as that of either of the plaintiffs or their clerk. The courts of justice do not ignore the great improvement in the means of intercommunication which the telephone has made. Its nature, operation, and ordinary uses are facts of general scientific knowledge, of which the courts will take judicial notice as part of public contemporary history. When a person places himself in connection with a telephone system through an instrument in his office, he thereby invites communication in relation to his business through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible. The ruling here announced is intended to determine merely the admissibility of such conversations in such circumstances, but not the effect of such evidence after its admission. It may be entitled, in each instance, to much or little weight in the estimation of the triers of fact, according to their views of its credibility, and of the other testimony in support or in contradiction of it. Finding none of the assignments of error well taken, we affirm the judgment, all concurring.

EVIDENCE AS TO TELEPHONE SERVICE.

The State, Samuel R. Rumsey, pros. v. The N. Y. & N. J. Teleph. Co. New Jersey Supreme Court, Feb. 17, 1887. 49 N. J. L. 322.

In an action brought to recover for the rent and services of a telephone it appeared that the number of each service was entered, at the time, upon a slip, and these slips were sent to the main office, where the

gross number of calls for each month was entered in a book, and the slips were afterwards destroyed. Held, that the book was not admissible in evidence.

EVIDENCE, USE OF TELEGRAMS AS.

McCormick & Richardson v. Joseph & Anderson. Alabama Supreme Court, Dec., 1887.

Oral evidence of the contents of a telegram cannot be received until the non-production of the original has been accounted for.

Riordan v. Guggerty. Iowa Supreme Court, Sept. 4, 1888. 74 Iowa 688.

It appearing by uncontradicted evidence, that a telegraph company customarily destroyed original telegrams after six months, and that the original of the one in question could not be found, held, that sufficient foundation was laid for the introduction of a copy, without proving the company's rule requiring originals to be destroyed.

Flint v. Kennedy. U. S. Cir. Ct., S. D. N. Y., Feb. 13, 1888. 33 Fed. R. 820.

In an action for the price of goods sold and delivered, the plaintiff's agent testified that he received defendant's order by telegram. The telegraph company had destroyed all memoranda in its possession concerning telegrams of the date in question, and the plaintiff had not preserved the original telegram received by him. Held, that secondary evidence of the contents of the telegram was admissible, though direct proof of the sending could not be given.

Terre Haute & I. R. Co. v. Stockwell. Indiana Supreme Court, March 16, 1889. 20 N. E. R. 650.

It not being shown that a telegram was reduced to writing, either when sent or when received, parol evidence of its contents may be admitted.

Anhauser Busch Brewing Co. v. Hutmacher. Illinois Supreme Court, April 5, 1889. 21 N. E. R. 626.

(Extract from head-note.) As between the sender and receiver of a telegram, the written message which is delivered to the receiver is the original, and is primary evidence, when the sender has taken the initiative in using the telegraph, and there is no evidence of error in transmission.

State of Nevada v. Joseph F. Espinozei. Nevada Supreme Court, October, 1888. 20 Nevada 209.

Upon a trial for larceny of a horse, a telegram sent by the defendant, soon after he left the place of the larceny, in which he offered horses for sale, is admissible as showing a desire to dispose of the stolen property.

Chester v. State. Texas Court of Appeals, June 11, 1887. 5 S. W. R. 125.

A telegram received by an accused person cannot be received in evidence against him, since its admission would contravene his constitutional right to be confronted with the witnesses against him.

The contents of telegrams sent by him or at his instance cannot be received against him until failure to produce the originals is accounted for.

Isaac Weil et al. v. Joseph Schwartz. Kansas City, Mo., Court of Appeals, April 5, 1886. 4 West. R. 772.

Under a statute which provides that false representations of financial credit and solvency, to be actionable, must be in writing, telegrams containing such alleged representations are not admissible.

POLES AND WIRES.—LEGISLATIVE AND MUNICIPAL CONTROL OF.

New Orleans Gas Light Co. v. Hart. Louisiana Supreme Court, May 7, 1888. 40 La. An. 474.

The following remarks were made by the court, being, however, *obiter* as to the case under consideration.

"The subjects upon which the State may act are almost infinite, yet, in its regulations with respect to all of them, there is this necessary limitation: that the State does not encroach upon the free exercise of the power vested in Congress by the constitution. Within that limitation, it may undoubtedly make all necessary provisions with respect to the buildings, poles, and wires of telegraph companies in its jurisdiction which the comfort and convenience of the community may require. *Telegraph Co. v. Pendleton*, 122 U. S. 859, 7 Sup. Ct. Rep. 1126. A similar question having been presented to the United States Circuit Court in Chicago, Ill., the learned court held that it is entirely competent for the city authorities, unless they are bound by some absolute contract permitting the poles and wires to stand as they are, to have them removed, and put an end to such unsightly obstructions as those poles and wires are in the streets. There must be a power somewhere to cause them to be removed, and to regulate and control the manner in which telegraph lines shall enter or pass through the city. *Telegraph Co. v. Chicago*, 16 Fed. Rep. 309."

POLES AND WIRES AS PROPERTY.

Boston Safe Deposit & Trust Co. v. Bankers' and Merchants' Tel. Co. et al. U. S. Cir. Ct., S. D. N. Y., Sept. 17, 1888. 36 Fed. R. 288.

In a contract for amalgamation of two telegraph companies, held (quoting from head-note) "that the strung wires did not become part of the realty by annexation, because the two companies had agreed in effect that they should remain personalty; and that it was competent for the two companies by such an agreement to determine the character of the property annexed, as against an existing mortgage."

TELEPHONE COMPANY.—RELATION OF PARENT TO LOCAL.

United States v. American Bell Teleph. Co. U. S. Cir. Ct., So. Dist., Ohio E. D., Nov., 1886. 29 Fed. R. 17.

Question of proper service of process.

(Extracts from head-note.) The contracts between the American Bell Teleph. Co. and the local corporations create the relation of licensor and lessor on the one hand, and licensee and lessee on the other, and not a relation of agency.

Transactions such as the American Bell Teleph. Co. has with its licensee corporations of Ohio, at its place of business in Boston and not elsewhere, are not the carrying on of business by it in Ohio, nor are such licensee corporations its managing agents.

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Whether or not a license fee is reasonable, is a question of law to be determined by the court.

A license fee of one dollar per pole and a penalty of five dollars for violating the ordinance, held not unreasonable.

That a telegraph company is not, at the time the fee is imposed, actually engaged in business, does not relieve it from paying the fee.

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An annual charge of five dollars per pole upon the poles of a telephone company already established, imposed by municipal ordinance as a "consideration for the privilege" is not a license fee.

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An original license fee of five dollars per pole, and an annual fee of one dollar per pole and \$2.50 per mile of wire, is not so obviously excessive as to warrant the court in adjudging the ordinance fixing it to be invalid.

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Fifty cents per pole not unreasonable, the company having a capital stock of \$135,000, and doing a dividend paying business.

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For stipulations as printed in blanks, see pp. 482, 572, 577, 582, 603, 651, 680, 702, 711, 721, 728, 782, 863.)

Liability may be limited, except as against the misconduct, fraud or gross negligence of the company.

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Stipulation against damages "happening from any cause," held unreasonable and void.

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Stipulation limiting liability for mistake or delay and exempting it from liability in case of cipher or obscure messages, does not apply in case of entire failure to transmit.	
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Sender not bound to know rule of company requiring messages to be written on blanks.	
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